B. Proceedings and Rulings in the Court of Appeals.

On September 22, 2003, Western States timely filed a notice of appeal to the Court of Appeals.

In October, 2003, Western States filed a Civil Appeals Docketing Statement with the Court of Appeals. App. 207.

Western States presented four issues in its opening appeal brief, none of which were specifically directed toward the City and County, or the granting of summary judgment dismissal of the compensatory damage claims against the City and County. The issues Western States presented in its opening appeal brief were as follows[3]:

> 1. Whether the State of Washington has a compelling interest to include race and sex based preferences in its affirmative action program for disadvantaged women and minorities in the highway construction industry even if the state cannot, either alone, or in conjunction with the federal government, provide a "firm basis" for concluding that a pattern or practice of past discrimination has infected the Washington highway construction industry.
>
> 2. Whether the federal government has a compelling interest to requiring the State of Washington to include race and sex based preferences in that state's affirmative action plan for "disadvantaged" business enterprises in the highway construction industry if the federal government cannot, either alone or in conjunction with the State, provide a "firm basis" for concluding that a

[3] App. 176.

pattern or practice of discrimination has infected the Washington highway construction industry.

3. Whether a federal program that requires each of the fifty states to independently develop and implement an affirmative action program for "disadvantaged business enterprises" in the highway construction industry is narrowly tailored, if that program requires, or purports to authorize, each and every state to include racial and gender preferenc s in its affirmative action plan without regard to the evidence, or lack thereof, of past discrimination in any one state.

4. Whether the disadvantaged business enterprise program developed by the state of Washington is narrowly tailored if that program includes race and sex based preferences when there has been no known discrimination in the Washington highway construction industry.

The City and County both argued in their appeal briefs that Western States limited its appeal to the issues specifically set forth in its opening brief, and any issue not raised or argued in Western States' opening brief was waived.[4] The City noted in its appeal brief the limited issues raised by Western States in its opening brief.[5] Western States' opening brief did not include any issue or argument directed toward the City or the County. Clark

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[4] *See* Brief of Appellee City of Vancouver, II. Statement of Issues, App. 131-132; Brief of Appellee Clark County, II. Statement of Issues, App. 108, 110-112.

[5] *See* Brief of Appellee City of Vancouver, II. Statement of Issues, App. 131-132.

County specifically raised this issue in its appeal brief[6]: "1. Whether Western States Paving Co. ("Western States") waived any claim of error related to the granting of summary judgment in favor of Clark County by not raising that alleged error in its opening brief."

Western States failed to raise or argue, in either its opening appeal brief or its reply appeal brief, that the District Court erred when it granted summary judgment dismissing the compensatory damage claims against the City and County.[7] The Court of Appeals did not specifically rule on the City and County's argument that Western States waived its issues with regard to the City and County because Western States never raised them in its opening brief.

The City and County also raised and argued their District Court argument in their appeal briefs, that summary judgment was proper because there was no evidence of racial or gender-based animus or intentional discrimination, a required element of the alleged causes of action. App. 142, 163-166; App. 108, 113-120. The City and County argued they were required to follow the State's DBE program that had received approval by the United States Department of Transportation ("USDOT") and Federal Highway Administration ("FHWA") or they would not have received the federal funding. App. 163-166; App. 110, 118-119. The facts presented in support of the City and County's motions for summary judgment were not

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[6] *See* Brief of Appellee Clark County, II. Statement of Issues, App. 108.

[7] *See* Western States' Brief of Appellant, App. 169-203, and Western States' Reply Brief of Appellant, App. 92-102.

disputed by Western States in its opening appeal brief or its reply appeal brief.[4] The Court of Appeals acknowledged the City and County's argument and then declined to consider and rule on it. App. 35-36, footnote 13.

The Court of Appeals affirmed summary judgment in favor of respondents United States, the USDOT, and the FHWA because the DBE program was narrowly tailored on its face. App. 35. However, the Court of Appeals reversed the District Court's grant of summary judgment dismissal to the City and County because the State of Washington failed to meet its burden of demonstrating that its DBE program was narrowly tailored to further Congress's compelling remedial interest. App. 35. The Court of Appeals ruled Western States did not renew its state law arguments on appeal and therefore, the state law issues were waived. App. 5, footnote 2. The Court of Appeals did not specifically rule on the City and County's argument about issue waiver by Western States, but reversed the summary judgment dismissal, essentially allowing preservation of an issue that was never raised by appellant in its opening brief. The Court of Appeals declined to consider the City and County's basis for summary judgment on compensatory damages.

The City and County each petitioned the Court of Appeals for a panel rehearing. App. 80-88 and App. 74-79. On August 8, 2005, the Court of Appeals, with a vote of 2-1, denied the petitions for rehearing. App. 72-73.

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[4] *See* Western States' Brief of Appellant, App. 169-203 and Western States' Reply Brief of Appellant, App. 92-102.

C. Issues Created by the Court of Appeals' Decision Require This Court's Action.

The Court of Appeals in this case entered a decision that is in conflict with other decisions of the Ninth Circuit and is internally inconsistent. The Court of Appeals, in this case, correctly followed the law in the Ninth Circuit when it held Western States had waived its state law arguments on appeal because it did not raise those issues on appeal. App. 5, footnote 2. However, the Court of Appeals turned its back on the doctrine of stare decisis when it reversed the District Court's summary judgment dismissal of the City and County even though Western States failed to raise or argue any issue involving the dismissal of the compensatory damage claims against the City and County, or any error on the part of the District Court for granting summary judgment dismissal to the City and County. In spite of the City and County's briefing and arguments regarding this waiver by Western States, the Court of Appeals ignored its own basic rule prohibiting it from addressing any issue Western States failed to raise or argue in its opening brief. The Court of Appeals incorrectly allowed Western States to revive its action against the City and County, even though Western States did not raise or argue error on the part of the District Court for granting summary judgment dismissal to the City and County, or for any other issue specifically related to the City or County.

In addition to an internally inconsistent holding and a departure from the doctrine of stare decisis, the Court of Appeals did not consider the undisputed evidence which supported an alternative ground for summary judgment dismissal for the City and County. The Court of Appeals' failure to consider summary judgment dismissal on an

alternative ground when the record fairly supported this alternative ground, with undisputed facts, is in conflict with other decisions of the Ninth Circuit.

The acts of the Court of Appeals in this case are contrary to the law in the Ninth Circuit, and so far depart from the accepted and usual course of appellate proceedings as to call for an exercise of this Court's supervisory power. Application of the law and rules in the Ninth Circuit support affirmation of the District Court's order granting summary judgment dismissal to the City and County.

The City and County ask this Court grant their petition for a writ of certiorari to reverse the Court of Appeals' decision to bring the decision into conformity with existing Ninth Circuit authority and to harmonize the Court of Appeals' result with the decisional law of the Ninth Circuit.

ARGUMENT

A. The Court of Appeals Erroneously Allowed the Appellant to Prevail on an Issue That Was Not Properly Raised on Appeal.

The Court of Appeals' decision in this case conflicts with well established law of the Ninth Circuit and its own decision in the present case. The Court of Appeals properly ruled Western States waived its state law arguments when Western States did not renew those arguments in its

opening brief.[9] The Court of Appeals improperly and inconsistently ruled that Western States' compensatory damage claims against the City and County survived even though Western States failed to raise or argue this issue in its opening brief. Review of Ninth Circuit case authority and the internal inconsistency of this decision compel a result opposite of that reached by the Court of Appeals.

1. The Court of Appeals' Decision Failed to Follow Well Established Law of the Ninth Circuit That an Appellant Waives an Issue That is Not Properly Raised on Appeal.

The law in the Ninth Circuit is that issues not raised in a party's opening brief are waived. The Ninth Circuit Court of Appeals in *Paracor Finance v. General Elec. Capital Corp.*, 96 F.3d 1151, 1168 (9th Cir. 1996), stated, "It is well established in this Circuit that claims which are not addressed in the appellant's brief are deemed abandoned." Failure to raise an issue on appeal results in waiver of that issue. *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 726 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004, 113 S. Ct. 1645, 123 L. Ed. 2d 267 (1993). *See Alaska Ctr. for Env't v. United States Forest Serv.*, 189 F.3d 851, 858 n.4 (9th Cir. 1999) ("arguments not raised in opening brief are waived"); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986) (court of appeals ordinarily does not "consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief") (citing *International Union of Bricklayers and Allied Craftsman Local No. 20 v. Martin Jaska, Inc.*, 752

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[9] *See* App. 5, footnote 2, 407 F.3d 983, 2005 U.S. App. LEXIS 8061 at *5, n.2 (9th Cir. May 9, 2005).

F.2d 1401, 1404 (9th Cir. 1985)); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("arguments not raised by a party in its opening brief are deemed waived"); *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1046 n.7 (9th Cir. 1999) ("Brookfield chose not to argue its trademark dilution claim or its state law causes of action in its opening brief. We accordingly deem those issues waived."); *Zukle v. Regents of University of California*, 166 F.3d 1041, 1045 n.10 (9th Cir. 1999) ("Zukle did not raise her race, sex or sexual harassment claims in her opening brief; therefore she has waived any appeal from the district court's grant of summary judgment on these claims.").

The Ninth Circuit Court of Appeals reviews only issues that are argued specifically and distinctly in a party's opening brief. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994). The Court of Appeals will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim. *Id.* The Ninth Circuit Court of Appeals in *Greenwood v. FAA*, *id.* at 977, quoted with approval the Seventh Circuit in *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991): "[J]udges are not like pigs, hunting for truffles buried in briefs." Appellants are required to present specific, cogent argument for the court's consideration. If an appellant fails to do so in its opening brief, appellant waives the issue or claim.

In addition, the law of the Ninth Circuit requires any issues raised by appellant must be fully briefed and supported by authority or argued for the issue to be preserved. *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1105 (9th Cir. 1999) ("issues appealed but not briefed are deemed abandoned"; issues raised in a brief

which are not supported by argument are deemed abandoned); *FDIC v. Garner*, 126 F.3d 1138, 1145 (9th Cir. 1997) (issue is deemed waived where it is presented without any case law or argument in support of claim); *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.4 and 784 n.11 (9th Cir. 1996) (raising the issue in a footnote without authority or argument is insufficient; Ninth Circuit would not consider argument made for the first time in reply brief); *Pierce v. Multnomah County*, 76 F.3d 1032, 1037 n.3 (9th Cir. 1996), *cert. denied*, 519 U.S. 1006, 117 S. Ct. 506, 136 L. Ed. 2d 397 (1996) ("issue raised in opening brief but not supported by argument is deemed abandoned").

In this case, Western States failed to raise or argue, at any time in its appeal, any error on the part of the District Court for granting summary judgment dismissal of the compensatory damage claim against the City and County. The City and County argued Western States' omission in their appeal briefs, and then again in their petitions for panel rehearing. The Court of Appeals in this case should not have allowed Western States to succeed in its action for compensatory damages against the City and County after this glaring omission by Western States. The Court of Appeals' ruling in this case is contrary to the well established law in the Ninth Circuit.

2. The Court of Appeals' Decision in This Case is Internally Inconsistent Because the Court of Appeals ruled Two Different Ways on an Identical Issue.

The Court of Appeals' decision in this case is internally inconsistent because it correctly held, on one hand, Western States waived its state law claims because

Western States failed to raise or argue those claims in its opening brief[10]; yet, on the other hand, the Court of Appeals incorrectly ignored the City and County's arguments that Western States waived its claims against the City and County when Western States failed to raise or argue claims against the City and County, or assign error to the District Court's decision to grant summary judgment dismissal to the City and County.

If Western States waived its state law claims by failing to raise them in its opening brief, it likewise waived its claims against the City and County when it failed to raise or argue claims relating to the dismissal of the compensatory damage claims against the City and County in its opening brief. The Court of Appeals in this case was correct when it ruled issues not raised in a party's opening brief are waived.

Consistent application of well established law in the Ninth Circuit requires reversal of the Court of Appeals' decision in this case, concerning the City and County, in order to restore harmony within this opinion, and harmony with other decisions in the Ninth Circuit. The opinion in this case is internally inconsistent and out of harmony with other opinions of the Ninth Circuit because the Court of Appeals allowed Western States to maintain an appealable issue, regarding the City and County, without requiring Western States raise and argue that issue in its opening brief.

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[10] App. 5, footnote 2.

3. The Doctrine of Stare Decisis Requires the Court of Appeals Find Respondent Western States Waived its Appealable Issues Regarding Petitioners City and County.

The Court of Appeals must be consistent in its application of well established law in the Ninth Circuit. The doctrine of stare decisis is rooted in the principle that it is desirable the law provide a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970) (superseded by statute on other grounds).

The Ninth Circuit Court of Appeals in *Hart v. Massanari*, 266 F.3d 1155, 1170-1171 (9th Cir. 2001), discussed the importance of stare decisis:

> Binding authority . . . cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point is the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so. . . . Circuit law, . . . , binds all courts within a particular circuit, including the court of appeals itself. . . . Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless

> overruled by the court itself sitting en banc, or by the Supreme Court.

Consistency in the law of the circuit is of the utmost importance. The well established law in the Ninth Circuit is issues not raised in a party's opening brief are waived. Western States presented four issues in its opening brief, none of which were directed at the dismissal of the compensatory damage claims against the City or County, or further alleged any error on the part of the District Court for granting summary judgment dismissal to the City and County. The doctrine of stare decisis requires the Court of Appeals, in this case, find Western States waived its appealable issues regarding the City and County.

B. The Court of Appeals' Decision Does Not Follow Other Ninth Circuit Caselaw Because it Failed to Consider the City and County's Basis for Summary Judgment on Compensatory Damages.

1. There is Undisputed Evidence Which Supports Summary Judgment Dismissal.

In addition to an internally inconsistent holding and a departure from the doctrine of stare decisis, the Court of Appeals in this case did not consider the undisputed evidence which supported an alternative ground for summary judgment dismissal of the compensatory damages claim against the City and County. The Court of Appeals' failure to consider summary judgment dismissal on an alternative ground when the record fairly supported this alternative ground, with undisputed facts, is in conflict with other decisions of the Ninth Circuit.

a. The City and County's Motions for Summary Judgment Before the District Court Provided the Basis for Dismissal of the Compensatory Damages.

The City and County moved the District Court for summary judgment dismissal under Fed. R. Civ. P. 56, based upon the inability of Western States to prove the City and County had engaged in intentional or purposeful discrimination, an essential element of Western States' claim for compensatory damages. App. 237-240; App. 227-234.

i. Summary Judgment Standard.

Under Fed. R. Civ. P. 56(c), the entry of summary judgment is mandated when the evidence in the record shows no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp.*, 477 U.S. at 322-323. A party opposing summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S. at 324. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). The question is not whether there is literally no evidence, "but whether there is any upon which a jury can properly proceed to find a verdict for the party producing

it, upon whom the onus of proof is imposed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In a summary judgment motion even the "existence of a scintilla of evidence in support of the appellant's position will be insufficient; there must be *evidence* on which a jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252, (emphasis added). The nonmoving party may not merely state that it will discredit the moving party's evidence at trial and proceed in the hope that something can be developed at trial in the way of evidence to support its claim. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc.*, 809 F.2d 626, 630 (9th Cir. 1987), citing *Anderson, supra*. Conclusory, nonspecific statements in affidavits are not sufficient, and "missing facts" will not be "presumed". *Lujan v. Natl. Wildlife Fed'n.*, 497 U.S. 871, 888-889, 110 S. Ct. 3177, 3188-3189, 111 L. Ed. 2d 695 (1990). The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc.*, 809 F.2d at 631 n.3.

ii. Western States Did Not Prove an Essential Element of its Claim for Compensatory Damages Against the City and County.

Western States admitted in its Memorandum in Opposition of City and County's Summary Judgment, App. 223, that for Western States "[t]o prevail in an action under 42 U.S.C. §1981, §1983, and 42 U.S.C. §2000(d) a plaintiff must prove the defendant engaged in intentional or purposeful discrimination". Western States also admitted it was

required to prove race was a "motivating factor" for the manner in which it was treated differently and not awarded the contracts. App. 225. Western States argued that "[d]irect evidence of discriminatory intent is demonstrated by the City and County adopting a policy that gives preference based upon race and gender". App. 225 Western States did not support that assertion with an affidavit or declaration.

Contrary to Western States' assertion, the City and the County did not "adopt a policy that gives preference based upon race and gender". The City and County merely complied with state and federal requirements that were imposed upon them as a condition of receiving federal funding for the road projects. The only reason the City and County contracts contained DBE goals was because the DBE goals were required by the federal and state agencies prior to receiving the federal funding.[11] The City and County did not have their own DBE programs or requirements related to the awarding of its contracts. These facts were never disputed by Western States or any of the other parties. There was absolutely no showing of any "intentional or purposeful discrimination" on the part of the City or County. There was absolutely nothing in the record to prove either the City or County was motivated by race. The City and County wanted the federal funding for building roads, and merely complied with requirements imposed on them. Western States did not make a sufficient showing on an essential element of his claim on which it had the burden of proof.

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[11] *See* Affidavit of Elizabeth Gotelli in Support of City's Motion for Summary Judgment, App. 241, and Declaration of Pete Cappell, App. 235.

The District Court dismissed Western States' compensatory damage claims after the District Court ruled TEA-21 was constitutional on its face and as applied. The District Court never ruled specifically on this particular ground for summary judgment dismissal.

2. The Renewed Arguments for Summary Judgment Dismissal Should Have Been Considered by the Court of Appeals to Uphold the Summary Judgment Dismissal of the City and County.

The City and County renewed their arguments for summary judgment dismissal of Western States' compensatory damages against them in their Court of Appeals' briefs. App. 139, 142, 163-166 and App. 108-109, 113-119. This argument was partially based upon the lack of evidence of racial or gender-based animus or intentional discrimination.

Western States failed to discuss any evidence of racial or gender-based animus or intentional discrimination by the City or County, in either its opening brief or its reply brief to the Court of Appeals. Western States completely failed to respond to the City and County arguments supporting affirmation of the summary judgment dismissal.

A review of the District Court's grant of summary judgment is conducted de novo. *Moran v. State of Washington*, 147 F.3d 839, 844 (9th Cir. 1998). Summary judgment must be granted against a party who fails to make a showing sufficient to establish the existence of an essential element to the party's case. *Celotex v. Catrett*, 47 U.S. at 322. On appeal, the Court of Appeals limits its review to the record presented to the District Court. *Harkins*

Amusement Enterprises, Inc. v. General Cinema Corp., 850 F.2d 477, 482 (9th Cir. 1988). The Court of Appeals in this case correctly stated "[d]ocuments or facts not presented to the district court are not part of the record on appeal". (Citations omitted.) App. 33.

The undisputed facts presented to the District Court, showed there was no proof the City or County had racial or gender-based animus or engaged in intentional or purposeful discrimination. The evidence showed the City and County were forced to place DBE goal requirements into their contracts as a condition of receiving the federal funding.

The Court of Appeals acknowledged the City and County's argument, in a footnote, but stated:

> The city and county argue that they are entitled to summary judgment on Western States' damage claims because there is no evidence that they engaged in intentional racial discrimination. The district court did not reach this issue. . . . Although this Court 'may affirm summary judgment on an alternative ground to that given by the district court if the record fairly supports the alternative ground,' (citations omitted), we need not decide whether it would be appropriate to do so here. It will be necessary on remand for the district court to address the State's liability for damages, and thus we also remand Western States' damages claims against the city and

> county to allow the district court to resolve all aspects of this issue in the first instance.[12]

The law in the Ninth Circuit is the Court of Appeals may uphold a grant of summary judgment on a ground different than that on which the trial court relied. *Hell's Angels Motorcycle Corp. v. McKinley*, 360 F.3d 930, 933 (9th Cir. 2004) (Ninth Circuit may affirm on any basis finding support in record); *Pritikin v. Department of Energy*, 254 F.3d 791, 796 (9th Cir. 2001), *cert. denied*, 534 U.S. 1133, 122 S. Ct. 1076, 151 L. Ed. 2d 977 (2002) (Ninth Circuit may affirm district court's decision granting summary judgment "on any ground supported by the record"); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir. 1994). Not only "may" the Court affirm, it "must" in fact affirm. *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980). "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Id.*, citing *Helvering v. Gowan*, 302 U.S. 238, 245, 58 S. Ct. 154, 158, 82 L. Ed. 224 (1937).

The City and County argued this position in their opening appeal briefs. Western States completely failed to respond to the City and County's arguments supporting affirmation of the summary judgment dismissal.

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[12] *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983, 2005 U.S. App. LEXIS 8061 at *49, n.13 (9th Cir. May 9, 2005). App. 35-36, footnote 13.

The Court of Appeals refused to consider the arguments put forth by the City and County to support affirmation of the District Court's decision to dismiss Western States' compensatory damage claims against the City and County. Although the law of summary judgment motion practice required Western States to set forth specific facts showing there is a genuine issue for trial to survive a motion for summary judgment dismissal, it failed to do so. There was absolutely no showing of any "intentional or purposeful discrimination" on the part of the City or County, or anything to prove either the City or County was motivated by race or gender.

The Court of Appeals' failure to consider summary judgment dismissal on an alternative ground when the record fairly supported this alternative ground, with undisputed facts, is in conflict with other decisions of the Ninth Circuit.

C. The Decision in this Case Involves a Question of Exceptional Importance in that the Result, If Undisturbed, Will Lead to Inconsistency in the Law of the Ninth Circuit and Allow an Opinion that is Internally Inconsistent and Contrary to the Doctrine of Stare Decisis.

The Court of Appeals' opinion, as it currently stands, is in conflict with the well established law of the Ninth Circuit on two grounds. 1) The Court of Appeals in this case overturned the District Court's summary judgment dismissal of Western States' compensatory damage claims against the City and County without requiring Western States to raise or argue the District Court erred on this issue. In direct conflict with the above-described action, the Court of Appeals, cognizant of the well established law,

ruled Western States' state law issues were waived since Western States had not raised or argued those in its opening brief. 2) The Court of Appeals in this case failed to consider summary judgment dismissal of the City and County on an alternative ground when the record fairly supported this alternative ground, with undisputed facts.

In addition to being in conflict with other decisions in the Ninth Circuit, this opinion is internally inconsistent.

Review of the Court of Appeals decision through a writ of certiorari will result in a decision that conforms to the doctrine of stare decisis, restores harmony within the Ninth Circuit, brings consistency to the Court of Appeals' decision, and preserves the faith in the judiciary as a source of impersonal and reasoned judgments.

Respectfully submitted,

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CURT WYRICK, Chief Deputy
Attorney for Petitioner Clark County, Washington

November 7, 2005

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN STATES PAVING CO., INC., *Plaintiff-Appellant,* v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; CITY OF VANCOUVER, WASHINGTON; CLARK COUNTY, WASHINGTON; DOUGLAS MACDONALD, *Defendants-Appellees,* UNITED STATES OF AMERICA; U.S. DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION, *Defendants-Intervenors-Appellees.*	No. 03-35783 D.C. No. CV-00-05204-RBL OPINION

Appeal from the United States District Court
for the Western District of Washington (Tacoma)
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted
February 11, 2005 – Seattle, Washington

Filed May 9, 2005

Before: Monroe G. McKay,* Diarmuid F. O'Scannlain, and Carlos T. Bea, Circuit Judges.

Opinion by Judge O'Scannlain;
Partial Concurrence and Partial Dissent by Judge McKay

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* The Honorable Monroe G. McKay, Senior United States Circuit Judge for the Tenth Circuit, sitting by designation.

COUNSEL

Gary E. Lofland, Lofland and Associates, Yakima, Washington, argued the cause for the appellant.

Lisa J. Stark, United States Department of Justice, Washington, D.C., argued the cause for appellees United States of America, U.S. Department of Transportation, and Federal Highway Administration; R. Alexander Acosta, Assistant Attorney General, Mark L. Gross, United States Department of Justice, Washington, D.C., and Jeffrey A. Rosen, Paul M. Geier, and Edward V.A. Kussy, United States Department of Transportation, Washington, D.C., were on the brief.

Steve E. Dietrich, Assistant Attorney General, Olympia, Washington, argued the cause for appellee Washington State Department of Transportation; Christine O. Gregoire, Attorney General, Olympia, Washington, was on the brief.

E. Bronson Potter, Senior Deputy Prosecuting Attorney, Vancouver, Washington, argued the cause for appellee Clark County.

Alison J. Chinn, Assistant City Attorney, Vancouver, Washington, was on the brief for appellee City of Vancouver.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether the Transportation Equity Act for the 21st Century, which authorizes the use of race- and sex-based preferences in federally funded transportation

contracts, violates equal protection, either on its face or as applied by the State of Washington.

I

Western States Paving Co. ("Western States") is an asphalt and paving contractor based in Vancouver, Washington. The company is owned by a white male. In July 2000, Western States submitted a bid for subcontracting work on the City of Vancouver's "NE Burton Road Project." The project was financed by federal transportation funds provided to the Washington State Department of Transportation ("WSDOT") under the Transportation Equity Act for the 21st Century ("TEA-21"). In order to comply with TEA-21's minority utilization requirements, the State mandated that the city obtain 14% minority participation on the project.[1] The prime contractor was bound by this requirement and rejected Western States' bid in favor of a higher bid from a minority-owned firm.

In August 2000, Western States submitted a subcontracting bid on Clark County's "Padden Parkway (East Leg)" project, which was substantially financed with TEA-21 funds. In distributing these funds to Clark County, the WSDOT imposed a 14% minority utilization requirement. The prime contractor did not select Western States, even though its bid was $100,000 less than that of the minority-owned firm that was selected. The prime contractor explicitly identified the contract's minority utilization

[1] Because TEA-21 does not draw any material distinctions between racial minorities and women, the term "minority" will be used to encompass both groups.

requirement as the reason that it rejected Western States' bid.

Western States filed suit against the WSDOT, Clark County, and the City of Vancouver in the United States District Court for the Western District of Washington. Western States sought a declaratory judgment holding TEA-21's minority preference program to be a violation of equal protection under the Fifth and Fourteenth Amendments of the U.S. Constitution, either on its face or as applied by the State of Washington. Western States also requested damages under 42 U.S.C. §§ 1981, 1983, and 2000(d) and relief under Washington state law. The United States, the U.S. Department of Transportation ("USDOT"), and the Federal Highway Administration intervened to defend TEA-21's facial constitutionality. Although the federal government took no position regarding Western States' as applied challenge, it acknowledged that the "state would have to have evidence of past or current effects of discrimination to use race-conscious goals." Dist. Ct. Oral Argument Tr. 48.

The district court held that TEA-21's minority preference program is constitutional both on its face and as applied, and granted the defendants summary judgment on that basis. In rejecting the facial challenge, the district court determined that Congress had identified significant evidence of discrimination in the transportation contracting industry and that TEA-21 is narrowly tailored to remedy such discrimination. The district court rejected Western States' as applied challenge because it concluded that Washington's implementation of TEA-21 comports with the federal program's requirements. The court did not require Washington to demonstrate that its minority preference program independently satisfies strict scrutiny.

The district court also held that Western States' claims under Washington law are without merit. Western States timely appealed.[2]

II

TEA-21 was enacted by Congress in 1998 and is the most recent in a series of federal transportation statutes providing for race- and sex-based contracting preferences.[3] Pub. L. No. 105-178, 112 Stat. 107 (1998). TEA-21 was initially scheduled to expire on September 30, 2003, but – pending permanent reauthorization – it has been temporarily renewed several times and is now due to lapse on May 31, 2005. Surface Transportation Extension Act of 2004, Part V, Pub. L. No. 108-310, 118 Stat. 1144.

The pertinent provision of TEA-21 provides that, "[e]xcept to the extent that the Secretary [of Transportation] determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." § 1101(b)(1), 112 Stat. at 113. The specifics of this minority preference

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[2] Because Western States did not renew its state law arguments on appeal, those issues are waived. *See Alaska Ctr. for the Env't v. United States Forest Serv.*, 189 F.3d 851, 858 n.4 (9th Cir. 1999) ("Arguments not raised in [an] opening brief are waived.")

[3] TEA-21 replaced the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102-240, § 1003(b), 105 Stat. 1914, 1919-21. ISTEA was preceded by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145, and the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100.

program are set forth in regulations promulgated by the USDOT. *See* 49 C.F.R. pt. 26 (1999).

The regulations seek "[t]o create a level playing field on which [disadvantaged business enterprises] can compete fairly for DOT-assisted contracts." *Id.* § 26.1(b). A disadvantaged business enterprise ("DBE") is defined as a small business owned and controlled by one or more individuals who are socially and economically disadvantaged. *Id.* § 26.5. Although the term "socially and economically disadvantaged" is race- and sex-neutral on its face, the TEA-21 regulations presume that Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and women are socially and economically disadvantaged.[4] *Id.* § 26.67(a).

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[4] The regulations further delineate the numerous ethnic groups that are subsumed by each of these broad classifications:

> (i) "Black Americans" . . . includes persons having origins in any of the Black racial groups of Africa;
>
> (ii) "Hispanic Americans" . . . includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
>
> (iii) "Native Americans" . . . includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
>
> (iv) "Asian-Pacific Americans" . . . includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia or Hong Kong;
>
> (v) "Subcontinent Asian Americans" . . . includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka. . . .

49 C.F.R. § 26.5.

This presumption of disadvantage is rebutted where the individual has a personal net worth of more than $750,000 or a preponderance of the evidence demonstrates that the individual is not in fact socially and economically disadvantaged. *Id.* § 26.67(b). Firms owned and controlled by someone who is not presumed to be disadvantaged (i.e., a white male) can qualify for DBE status if the individual can demonstrate that he is in fact socially and economically disadvantaged. *Id.* § 26.67(d).

The regulations do not establish a nationwide DBE program centrally administered by the USDOT. Rather, the regulations delegate to each State that accepts federal transportation funds the responsibility for implementing a DBE program that comports with TEA-21. The regulations accordingly explain that the 10% DBE utilization requirement established by the TEA-21 statute is merely "aspirational" in nature. *Id.* § 26.41(b). The statutory goal "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." *Id.* § 26.41(c).

The TEA-21 regulations instead delineate a two-step process that a State must follow to set a DBE utilization goal that reflects its "determination of the level of DBE participation [that] would [be] expect[ed] absent the effects of discrimination." *Id.* § 26.45(b). In establishing this goal, a State must first calculate the relative availability of DBEs in its local transportation contracting industry. *Id.* § 26.45(c). One acceptable means of making this determination is by dividing the number of ready, willing, and able DBEs in a State by the total number of ready, willing, and able firms. *Id.* § 26.45(c)(1). Under step two, a State is required to adjust this base figure upward or downward to

reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies. *Id.* § 26.45(d)(1). A State may also consider discrimination against DBEs in the bonding and financing industries, as well as the present effects of past discrimination. *Id.* § 26.45(d)(2)-(3). The final, adjusted figure represents the proportion of federal transportation funding that a State must allocate to DBEs during the forthcoming fiscal year. *Id.* § 26.45(e)(1). A State must submit its DBE program to the USDOT for review by August 1 of each year. *Id.* § 26.45(f)(1).

The TEA-21 regulations expressly prohibit States from apportioning their DBE utilization goal among different minority groups (e.g., allocating 5% to Black Americans, 3% to Hispanic Americans, 0% to Asian Americans, etc.); rather, an undifferentiated goal that encompasses all minority groups is required. *Id.* § 26.45(h). A State must meet the maximum feasible portion of this goal through race-neutral means,[5] including informational and instructional programs targeted toward all small businesses. *Id.* § 26.51(a)-(b). A State must use race-conscious contract goals to achieve any portion of its DBE utilization requirement that cannot be attained through these race-neutral means. *Id.* § 26.51(d). Even when race-conscious measures are necessary, however, the regulations do not require that DBE utilization goals be included in every contract – or that they be set at the same level in every contract in which they are used – as long as the overall

[5] The TEA-21 regulations use the term "race-neutral" to encompass "sex-neutral," and this convention will be followed here.

effect is to obtain that portion of the requisite DBE participation that cannot be achieved through race-neutral means. *Id.* § 26.51(e)(2).

Prime contractors to whom a State awards federally funded transportation contracts must undertake good faith efforts to satisfy a contract's DBE utilization goal by allocating the designated percentage of funds to DBE firms. *Id.* § 26.53(a). States are prohibited from instituting rigid quotas that do not account for a prime contractor's good faith efforts to subcontract work to DBEs. *Id.* § 26.43(a).

III

"[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Peña ("Adarand III")*, 515 U.S. 200, 227 (1995).[6] "The burden of justifying different treatment by ethnicity or sex is always on the government." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *see also Johnson v. California*, 125 S. Ct. 1141, 1146 n.1 (2005) ("We put the

[6] Sex-based classifications must be both supported by an "exceedingly persuasive justification" and substantially related to the achievement of that underlying objective. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (internal quotation marks omitted). The district court did not conduct a separate analysis of TEA-21's sex-based classifications under this standard. We likewise conclude that such an inquiry is unnecessary because, in this case, intermediate scrutiny would not yield a different result than that obtained under strict scrutiny's more stringent standard.

burden on state actors to demonstrate that their race-based policies are justified."); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) ("To withstand our strict scrutiny analysis, [the University of Michigan] must demonstrate that [its] use of race in its current admission program employs narrowly tailored measures that further compelling governmental interests." (internal quotation marks omitted)). In addressing Western States' facial challenge, we must therefore determine whether the United States has met its burden of demonstrating that the federal statute and regulations satisfy strict scrutiny's exacting requirements. When considering the as-applied challenge, we must decide whether the State of Washington has met this same burden regarding its implementation of TEA-21's DBE program.

Two circuits have already considered TEA-21's constitutionality, and we will make frequent reference to these instructive decisions. In *Adarand Constructors, Inc. v. Slater ("Adarand VII")*, 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed sub nom., Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001), the Tenth Circuit upheld TEA-21 on its face without considering whether it is constitutional as applied by any particular State. In *Sherbrooke Turf Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 2158 (2004), the Eighth Circuit upheld TEA-21 on its face and as applied by the States of Minnesota and Nebraska.

IV

We turn first to Western States' facial challenge. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the

challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

A

The federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality op. of O'Connor, J.) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."); *Adarand VII*, 228 F.3d at 1176 ("The Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice.").

Nevertheless, Congress may not merely intone the mantra of "discrimination" to satisfy the "searching examination" mandated by equal protection. *Adarand III*, 515 U.S. at 223 (internal quotation marks omitted); *see also Croson*, 488 U.S. at 500 ("[T]he mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight."). Rather, we must evaluate the evidence that Congress considered in enacting TEA-21 to ensure that it had a "strong basis in evidence for its conclusion that remedial action was necessary." *Id.* (internal quotation marks omitted); *see also id.* at 493 (plurality

op. of O'Connor, J.) ("Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.").

Both statistical and anecdotal evidence of discrimination are relevant in identifying the existence of discrimination. *See Adarand VII*, 228 F.3d at 1166. Congress considered the following statistical evidence when debating TEA-21's enactment in 1998:

- Racial minorities constitute more than 20% percent of the United States population, but own only 9% of all businesses. 144 CONG. REC. H3945, H3958 (daily ed. May 22, 1998) (statement of Del. Norton).
- Firms owned by racial minorities have, on average, gross receipts that are approximately one-third those of firms owned by non-minorities. *Id.*
- Although racial minorities own 9% of all businesses, they receive only 4.1% of federal contracting dollars. *Id.*
- Women own nearly a third of all small businesses but receive less than 3% of federal contracting dollars. *Id.*
- White business owners in the construction industry receive more than 50 times as many loan dollars per dollar of equity capital as African-American owners with identical borrowing characteristics. *Id.*

- After the Supreme Court's 1989 *Croson* decision, many state and local governments removed affirmative action provisions from their public contracts. This prompted a significant drop in racial minorities' participation in the construction industry. In Richmond, Virginia, for example, minority participation in construction decreased from 40% of all contracts to less than 3% after the city's affirmative action program was discontinued. Similar results were seen in Philadelphia, Pennsylvania (97% decline), Tampa, Florida (99% decline for African-Americans and 50% for Hispanics), and San Jose, California (minority participation fell from 6% to 1% in prime construction contracts). *Id.*

Congress also explicitly relied upon a Department of Justice study – entitled *The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey* – that documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts. 61 Fed. Reg. 26,050 (May 23, 1996). The report found that discrimination by trade unions and financial lenders often precludes racial minorities from obtaining the experience and capital necessary to start businesses. *Id.* at 26,055 ("Discrimination by unions has been recognized as a major factor in preventing minorities from obtaining employment opportunities in the skilled trades."); *id.* at 26,058 (citing evidence that African-Americans are three times more likely to be rejected for business loans than whites). The study also found that even when minorities are able to start a business, their success is often hampered by discrimination by prime contractors, business networks, suppliers, and bonding companies. *Id.* Such discrimination increases minority-owned firms' cost of

doing business; these costs must then be passed along to customers, which results in minority-owned firms being less competitive than those owned by non-minorities. *See id.* at 26,059 ("institutional wall[s] and old-boy network[s] . . . make[ ] it exceedingly difficult for minority firms to break into the private commercial sector" (internal quotation marks omitted; alterations in original)).

Although Congress did not possess evidence that minorities suffer discrimination in every State's public contracting market, Congress need not undertake such an onerous task when enacting legislation that is applicable on a nationwide basis. *See Rothe Dev. Corp. v. United States Dep't of Def.*, 262 F.3d 1306, 1329 (Fed. Cir. 2001) ("Whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, we do not think that Congress needs to have had evidence before it of discrimination in all fifty states. . . . "). Indeed, when the Eighth and Tenth Circuits considered TEA-21's constitutionality, both courts concluded that the legislative record amply demonstrated Congress's compelling interest in remedying the effects of discrimination within the transportation contracting industry. *See Sherbrooke Turf Inc.*, 345 F.3d at 970 ("Congress has spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.").

The Tenth Circuit undertook an especially exhaustive inquiry into the evidence weighed by Congress and concluded that "both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises . . . are caused either by continuing discrimination or the lingering effects of

past discrimination on the relevant market." *Adarand VII*, 228 F.3d at 1175-76.

In light of the substantial body of statistical and anecdotal material considered at the time of TEA-21's enactment, Congress had a strong basis in evidence for concluding that – in at least some parts of the country – discrimination within the transportation contracting industry hinders minorities' ability to compete for federally funded contracts.

B

Once the government has demonstrated that it has a compelling basis for classifying individuals according to race, it must also establish that its use of race is narrowly tailored to further that interest. Indeed, "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz*, 539 U.S. at 270 (internal quotation marks omitted). The Supreme Court has identified several factors that are relevant in determining whether a racial classification is narrowly tailored: "the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *United States v. Paradise*, 480 U.S. 149, 171 (1987).

1

Although "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," it does

"require serious, good faith consideration of workable race-neutral alternatives." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *see also Adarand III*, 515 U.S. at 237-38 (when undertaking narrow tailoring analysis, courts must inquire "whether there was any consideration of the use of race-neutral means to increase minority business participation in government contracting" (internal quotation marks omitted)).

The TEA-21 regulations place a preference on the use of race-neutral means – including informational and instructional programs targeted toward all small businesses – to achieve a State's DBE utilization goal. *See Sherbrooke Turf, Inc.*, 345 F.3d at 972 ("the regulations place strong emphasis on the use of race-neutral means" (internal quotation marks omitted)). Indeed, the regulations require a State to "meet the maximum feasible portion of [its] overall goal by using race-neutral means." 49 C.F.R. § 26.51(a). Only when race-neutral efforts prove inadequate do the regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal. As the Tenth Circuit recognized, "[w]e therefore are dealing here with [regulations] that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized." *Adarand VII*, 228 F.3d at 1179.

2

A quota system is the hallmark of an inflexible affirmative action program. While "[q]uotas impose a fixed number or percentage which must be attained, or which cannot be exceeded, . . . a permissible goal . . . requires only a good-faith effort . . . to come within a

range demarcated by the goal itself." *Grutter*, 539 U.S. at 335 (internal quotation marks omitted; third and fourth alterations in original). In *Croson*, the Supreme Court invalidated a program that required prime contractors to whom the City of Richmond awarded construction projects to subcontract at least 30% of funds to minority-owned businesses. 488 U.S. at 477. The Court considered the program to be a "rigid racial quota" because waivers of the 30% goal were only permitted in "exceptional circumstances." *Id.* at 478-79, 499.

The TEA-21 regulations explicitly prohibit the use of quotas. 49 C.F.R. § 26.43(a). Moreover, where race-conscious contracting goals are used, prime contractors can meet that goal either by subcontracting the requisite amount of work to DBEs or by demonstrating good faith efforts to do so. *Id.* § 26.53(a). A State likewise cannot be penalized by the federal government for failing to attain its DBE utilization goal as long as it undertakes good faith compliance efforts. *Id.* § 26.47(a). TEA-21 therefore provides for a flexible system of contracting goals that contrasts sharply with the rigid quotas invalidated in *Croson*. *See Sherbrooke Turf, Inc.*, 345 F.3d at 972 ("the [TEA-21] DBE program has substantial flexibility").

A narrowly tailored remedial program must also include adequate durational limitations. *See Grutter*, 539 U.S. at 341-42 (because a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race . . . , race-conscious . . . policies must be limited in time"). TEA-21 comports with this requirement because it is subject to periodic reauthorization by Congress. The debates concerning reauthorization ensure that Congress regularly evaluates

whether a compelling interest continues to justify TEA-21's minority preference program. *See Sherbrooke Turf, Inc.*, 345 F.3d at 972 ("Periodic legislative debate assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter. . . . " (internal quotation marks omitted; first alteration in original)).

3

To be narrowly tailored, a minority preference program must establish utilization goals that bear a close relationship to minority firms' availability in a particular market. In *Croson*, for example, one of the constitutional shortcomings that the Court identified in the Richmond program was the city's use of the proportion of minorities in the local population to establish the 30% quota. 488 U.S. at 507. The Court explained that this numerical goal "rest[ed] upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id.* (internal quotation marks omitted).

The TEA-21 regulations avoid this pitfall. The regulations do not establish a mandatory nationwide standard for minority participation in transportation contracting. Indeed, the regulations clarify that the 10% DBE utilization goal found in the TEA-21 statute is "aspirational" only and that States are neither required – nor authorized – to set their own DBE goals at 10% by simply relying upon the statute. 49 C.F.R. § 26.41(b)-(c).

The TEA-21 regulations instead provide for each State to establish a DBE utilization goal that is based upon the proportion of ready, willing, and able DBEs in the State's

transportation contracting industry. *Id.* § 26.45(b). This provision ensures that each State sets a minority utilization goal that reflects the realities of its own labor market. *See Sherbrooke Turf, Inc.*, 345 F.3d at 972 ("DOT has tied the goals for DBE participation to the relevant labor markets.").

4

Implementation of the race-conscious contracting goals for which TEA-21 provides will inevitably result in bids submitted by non-DBE firms being rejected in favor of higher bids from DBEs. Although this places a very real burden on non-DBE firms, this fact alone does not invalidate TEA-21. If it did, all affirmative action programs would be unconstitutional because of the burden upon non-minorities. *Adarand III*, 515 U.S. at 237 (dispelling the notion that strict scrutiny is "strict in theory, but fatal in fact" (internal quotation marks omitted)); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280-81 (1986) (plurality op. of Powell, J.) ("When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a sharing of the burden by innocent parties is not impermissible." (internal quotation marks omitted)).

The TEA-21 regulations include a number of provisions designed to minimize the burden on non-minority firms. For example, a firm owned by a non-minority can qualify as a DBE if the owner can demonstrate that he is socially and economically disadvantaged. 49 C.F.R. § 26.67(d). Moreover, the $750,000 net worth limitation on DBE status ensures that wealthy minorities who have not encountered discriminatory impediments do not receive an

unwarranted windfall under the DBE program. *Id.* § 26.67(b).

5

Overall, TEA-21 and its implementing regulations possess all the features of a narrowly tailored remedial program: Race-conscious remedies are used only when race-neutral means prove ineffective, these race-conscious measures are employed in a flexible manner and for a limited duration, and the program is tied to the labor market in each State and is designed to minimize the burden on non-minorities. *See Sherbrooke Turf, Inc.*, 345 F.3d at 972 (concluding that "the DOT regulations, on their face, satisfy the Supreme Court's narrow tailoring requirements"); *Adarand VII*, 228 F.3d at 1187 (same).

We are satisfied that TEA-21's DBE program is a narrowly tailored means of remedying the effects of race- and sex-based discrimination within the transportation contracting industry, and thus Western States' facial challenge must fail.

V

We next consider Western States' as-applied challenge to the State of Washington's implementation of TEA-21.

A

Western States argues that TEA-21 is unconstitutional as applied by Washington because there is no evidence of discrimination within the State's transportation contracting industry. The State responds that it is not obligated to demonstrate that its application of TEA-21

independently satisfies strict scrutiny. The State instead argues that its DBE program is constitutional because it comports with the federal statute and regulations.[7]

The United States, which intervened solely to defend TEA-21's facial constitutionality, disagrees with Washington's effort to shelter its DBE program from as-applied scrutiny. Indeed, at various stages throughout this litigation – including during the district court and appellate oral arguments – the United States has unambiguously conceded that TEA-21's race-conscious measures can be constitutionally applied only in those States where the effects of discrimination are present. *See* Br. for the United States at 28 ("DOT's regulations . . . are designed to assist States in ensuring that race-conscious remedies are limited to *only* those jurisdictions where discrimination or its effects are a problem. . . ."); Dist. Ct. Oral Argument Tr. 11 ("With respect to the individual contract goals, our regulations give maximum discretion to the states to use those or not to use those, although . . . the use of race-conscious goals need [sic] to be based on evidence of discrimination or the effects of discrimination in the state that has to be remedied.").

The district court sided with Washington and held that a "state recipient of federal highway funds is not required to independently establish that its DBE program satisfied the strict scrutiny standard." Dist. Ct. Order 17. The district court accordingly rejected Western States' as-applied challenge because the Washington DBE program is consistent with the federal program's requirements.

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[7] Western States does not dispute the fact that Washington's DBE program complies with the federal program's requirements.

As a threshold matter, we must therefore determine whether Washington's DBE program is even susceptible to an as-applied challenge.

1

The Eighth Circuit is the only other appellate court to have confronted an as-applied challenge to TEA-21.[8] *See Sherbrooke Turf, Inc.*, 345 F.3d at 970. The Eighth Circuit concluded that it was unnecessary for Minnesota and Nebraska to establish that their DBE programs were premised upon a compelling interest independent of Congress's nationwide remedial objective. *Id.* The court explained:

> Compelling government interest looks at a statute or government program on its face. When the program is federal, the inquiry is (at least usually) national in scope. If Congress or the federal agency acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling government interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation.

Id.

Although the Eighth Circuit did not require Minnesota and Nebraska to identify an independent compelling interest for their DBE programs, the court did inquire into whether the States' implementation of TEA-21 was narrowly tailored to achieve Congress's remedial objective. *Id.*

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[8] The Tenth Circuit in *Adarand VII* did not consider TEA-21's constitutionality as applied by a specific State and did not address whether it would be appropriate to do so.

at 973. In so doing, the court considered whether discrimination had actually occurred in Minnesota and Nebraska because "to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny." *Id.* at 971. Both Minnesota and Nebraska had hired outside consulting firms to conduct statistical analyses of the availability and capacity of DBEs in their local markets, and the Eighth Circuit relied upon those studies to hold that the States' DBE programs independently satisfied strict scrutiny's narrow tailoring requirement. *Id.* at 973-74.

2

We agree with the Eighth Circuit that Washington need not demonstrate an independent compelling interest for its DBE program. When Congress enacted TEA-21, it identified a compelling nationwide interest in remedying discrimination in the transportation contracting industry. Even if such discrimination does not exist in Washington, the State's implementation of TEA-21 nevertheless rests upon the compelling nationwide interest identified by Congress.

We also agree with the Eighth Circuit that it is necessary to undertake an as-applied inquiry into whether Washington's DBE program is narrowly tailored, and we therefore conclude that the district court erred when it upheld Washington's DBE program simply because the

State complied with the federal program's requirements.[9] Whether Washington's DBE program is narrowly tailored

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[9] The district court cited cases from the Sixth and Seventh Circuits to bolster its conclusion that Washington need not independently satisfy strict scrutiny. The Seventh Circuit's decision in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) (Posner, J.), does not support the district court's unwillingness to pursue an as-applied narrow tailoring inquiry. There, a group of contractors challenged Wisconsin's implementation of the affirmative action provisions of a predecessor statute to TEA-21. *Id.* at 421. The court refused to consider whether discrimination had actually taken place in Wisconsin because the contractors had conceded that the federal statute was constitutional both on its face and as applied. *Id.* at 423 ("[The contractors'] arguments, whatever merit they have or lack as an original matter, are inconsistent with the contractors' decision not to challenge the validity of the federal statute or regulations."); *see also id.* ("[The contractors] challenge the Act neither on its face nor as applied."). Because constitutionality was not at issue, there was no basis for the court to undertake an as-applied inquiry. Moreover, although the only question before the court was whether Wisconsin's program complied with the federal statute, the court nevertheless observed that the statute's affirmative action provisions would be unconstitutional if applied in a State with no history of discrimination against minorities. *See id.* at 424 ("The contractors point out that the remedial objective which persuaded the Supreme Court to uphold the set-aside program challenged in the *Fullilove* [*v. Klutznick*, 448 U.S. 448 (1980),] case may be a fiction when it is applied to a liberal northern state with a relatively small minority population, such as Wisconsin, that does not even attempt to ascertain the existence of a legacy of discrimination. . . . But this is just to argue that set-aside programs such as this, upheld on their face in *Fullilove*, are, as administered, the practice of cynical racial or interest-group politics. Maybe so. If so, the program violates the Constitution.").

In the other case cited by the district court, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), the plaintiff did raise an as-applied constitutional challenge to a TEA-21 predecessor statute. Invoking *Milwaukee County Pavers*, the Sixth Circuit held that a State that implements the affirmative action provisions of a federal transportation statute need not establish discrimination within its own jurisdiction. *Id.* at 975. In so doing, the Seventh Circuit misread *Milwaukee County Pavers* in the same manner as did the district court. Both courts overlooked the fact that the plaintiffs in *Milwaukee County Pavers* were not pursuing an as-applied constitutional challenge.

to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry. If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex. As the United States correctly observed in its brief and during oral argument, it cannot be said that TEA-21 is a narrowly tailored remedial measure unless its application is limited to those States in which the effects of discrimination are actually present. *See* Dist. Ct. Oral Argument Tr. 48 ("The state would have to have evidence of past or current effects of discrimination to use race-conscious goals.").

Moreover, even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. In *Croson*, for example, one of the rationales upon which the Supreme Court relied to invalidate the city's quota system was the program's expansive definition of "[m]inority group members," which encompassed "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." 488 U.S. at 478 (second alteration in original). The Court admonished that the

> random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.
>
> If a 30% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are

> forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow?

Id. at 506; *see also Wygant*, 476 U.S. at 284 n.13 (plurality op. of Powell, J.) (the "definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent further illustrates the undifferentiated nature of the plan" (citation omitted)).

We have previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination. In *Monterey Mechanical Co. v. Wilson*, 125 F.3d at 704, we relied upon *Croson* to invalidate a California statute that required prime contractors on public projects to sub-contract 15% of the work to minority-owned businesses and 5% to woman-owned businesses. The statute defined the term "minority" to include Blacks, Hispanics, Native Americans, Pacific-Asians, Asian-Indians, and over two-dozen subgroups. *Id.* at 714. We concluded that the statute was not narrowly tailored because it provided race-based preferences to "groups highly unlikely to have been discriminated against in the California construction industry." *Id.* The overly inclusive designation of benefitted minority groups was a "red flag[] signalling that the statute is not, as the Equal Protection Clause requires, narrowly tailored." *Id.*; *see also Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001) (holding that an ordinance that established minimum levels of minority participation in county construction contracts was not narrowly tailored because it afforded preferences to a "laundry list" of minorities, not all of whom had suffered discrimination); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000) (invalidating a state statute that set aside 5% of

state construction contracts for "Blacks, American Indians, Hispanics, and Orientals" because "[b]y lumping together [these] groups, . . . the [program] may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven"); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992) ("the random inclusion of racial groups for which there is no evidence of past discrimination in the construction industry raises doubts about the remedial nature of [a minority set-aside] program" (internal quotation marks omitted)).

Accordingly, each of the principal minority groups benefitted by Washington's DBE program – Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and women – must have suffered discrimination within the State. If that is not the case, then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination. *See Builders Ass'n of Greater Chi.*, 256 F.3d at 646 (a "state or local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks *and* Asian-Americans *and* women" (emphases added)).

B

Washington's DBE program closely tracks the sample DBE program developed by the USDOT. In setting its DBE goal for the year 2000, the WSDOT first calculated the relative availability of ready, willing, and able DBEs in

the State.[10] It did so by dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database. This calculation yielded a figure of 11.17%, which represented the baseline availability of DBEs.

The WSDOT then adjusted this figure to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs on state projects between 1994 and 1998. The WSDOT determined that an upward adjustment was necessary to account for capacity because DBEs had performed approximately 18% of the work on state projects during that period. No adjustment was made, however, to account for discriminatory barriers in obtaining bonding and financing. The WSDOT explained that "[b]onding and financing have not been issues. WSDOT, through its DBE Support Services consultant, has been very aggressive in assisting DBEs with bonding and financing matters." WSDOT, *Disadvantaged Business Enterprise Program: Participation Plan*, at xviii-3 (2000). The WSDOT likewise did not make any adjustment to its base figure to reflect the effects of past or present discrimination because it lacked any statistical studies evidencing such discrimination. On the basis of the upward adjustment for capacity, the WSDOT arrived at a final DBE utilization goal of 14%.[11]

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[10] Washington's 2000 DBE program is the only finalized, USDOT-approved plan included in the record and is thus the only annual program that is properly before us.

[11] Although DBEs had performed 18% of work on state projects between 1994 and 1998, the State set the final capacity-adjusted figure

(Continued on following page)

The WSDOT then sought to ascertain the proportion of this goal that could be achieved through race-neutral means. In making that determination, it relied upon the 9% DBE participation rate on state-funded contracts that did not include affirmative action components. The WSDOT accordingly reasoned that it would need to achieve 5% of its 14% DBE utilization goal through race-conscious means. The USDOT approved the WSDOT's goal-setting methodology and the totality of its 2000 DBE program.

C

Washington has conceded that "there's [sic] no statistical studies done by the state to try to establish the existence of discrimination in the highway contracting industry that are completed or that are valid." Dist. Ct. Oral Argument Tr. 12. Washington nevertheless argues that it possesses evidence of discrimination because minority-owned firms had the capacity to perform 14% of the State's transportation contracting work in 2000 but received only 9% of the subcontracting funds on contracts that did not include affirmative action components.

The WSDOT arrived at that capacity figure by adjusting the percentage of ready, willing, and able DBEs in Washington (11.17%) to reflect the fact that DBEs had received approximately 18% of subcontracting funds between 1994 and 1998. This 18% figure was obtained, however, on contracts that included affirmative action components. *See* Dist. Ct. Oral Argument Tr. 20 ("I would

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at 14% because TEA-21 reduced the number of eligible DBEs in Washington by imposing more-stringent certification requirements.

venture to say that almost all of the subcontractor attainment [between 1994 and 1998] was race conscious because prior to TEA-21, we typically had 16 percent – our annual goal was always 16 percent, and that was often the contract goal. . . . [I]n fact, that was one of our problems when TEA-21 came around, the regulation had a whole new methodology for calculating and we were never certain what the proper level should be because we had always had goals in the past."). This number therefore does not reflect the performance capacity of DBEs in a race-neutral market. Indeed, the State acknowledged as much to the district court. *See id.* at 21 ("[W]e suspected that our past attainment was largely driven by the existence of goals on the contracts, and so it was very difficult to analyze what would be – what would have been the attainment absent those goals.").

The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs. Indeed, even in States in which there has never been discrimination, the proportion of work that DBEs receive on contracts that lack affirmative action requirements will be lower than the share that they obtain on contracts that include such measures because minority preferences afford DBEs a competitive advantage.

Accordingly, the only figure upon which Washington can plausibly rely to demonstrate discrimination is the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracting funds awarded to DBEs on race-neutral contracts (9%). This oversimplified statistical evidence is entitled to little weight, however, because it does not account for factors that may

affect the relative capacity of DBEs to undertake contracting work. Indeed, the fact that DBEs constitute 11.17% of the Washington market does not establish that they are able to perform 11.17% of the work. *See Md. Troopers Ass'n v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993) ("Inferring past discrimination from statistics alone assumes the most dubious of conclusions: that the true measure of racial equality is always to be found in numeric proportionality."). DBE firms may be smaller and less experienced than non-DBE firms (especially if they are new businesses started by recent immigrants) or they may be concentrated in certain geographic areas of the State, rendering them unavailable for a disproportionate amount of work. *See Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991) ("Statistical evidence often does not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral."); *Associated Gen. Contractors of Ohio, Inc.*, 214 F.3d at 736 ("If [minority-owned firms] comprise 10% of the total number of contracting firms in the state, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete."); *O'Donnell Constr. Co.*, 963 F.2d at 426 (holding that the small proportion of D.C. public contracts awarded to minority-owned firms did not establish discrimination because "[m]inority firms may not have bid on . . . construction contracts because they were generally small companies incapable of taking on large projects; or they may have been fully occupied on other projects; or the District's contracts may not have been as lucrative as others available in the Washington metropolitan area; *or*

they may not have had the expertise needed to perform the contracts; or they may have bid but were rejected because others came in with a lower price."). The State's statistical evidence controls for none of these factors.

Moreover, to the extent that this small disparity has any probative value, it is insufficient, standing alone, to establish the existence of discrimination against DBEs. *See Croson*, 488 U.S. at 509 (plurality op. of O'Connor, J.) ("Where there is a *significant* statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion *could* arise." (emphases added)). *Compare Md. Troopers Ass'n*, 993 F.2d at 1078 & n.3 (holding that there was no statistical evidence of discrimination where blacks constituted 22% of the relevant qualified labor pool and 17.1% of the Maryland State Police force), *with Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1414 (9th Cir. 1991) (concluding that discrimination was likely to exist where minority availability for prime contracts was 49.5% but minority dollar participation was only 11.1%), *and Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990) (holding that a "glaring 10.78% disparity between the percentage of minority contractors in the County and the percentage of County construction dollars awarded to minorities . . . clearly constitutes a prima facie case of discrimination").

The WSDOT likewise did not introduce any anecdotal evidence of discrimination. In response to Western States' discovery request, the WSDOT identified only three formal complaints alleging discrimination in Washington transportation contracts. Two of these complaints had been

investigated and rejected as meritless by the WSDOT; the third was still under investigation.

Perhaps recognizing the insufficiency of its evidentiary record, the State contended for the first time during oral argument before us that the affidavits signed by applicants seeking DBE status provide evidence of discrimination within Washington. *See* 49 C.F.R. § 26.67(a) ("You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged."). This argument is unavailing for two reasons.

First, these affidavits are not included in the record and thus are not properly before us. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990) ("Documents or facts not presented to the district court are not part of the record on appeal."). Second, even if we were to consider these affidavits, they do not provide any evidence of discrimination within Washington's transportation contracting industry. Notwithstanding the State's express representation to the contrary during oral argument, these affidavits do *not* require prospective DBEs to certify that they have been victims of discrimination in the contracting industry. Rather, as mandated by the federal regulations, the owner of a firm applying for DBE status need only attest to having "been subjected to racial or ethnic prejudice or cultural bias, or hav[ing] suffered the effects of discrimination, because of [his] identity as a member of one or more [minority groups], without regard to [his] individual qualities." *See* Disadvantaged Business Enterprise Program Uniform Certification Application, at 19, *available at* http://www.omwbe.wa.gov/Application%20for%20Website%20-%20Federal%20Program%20Only.pdf.

Such claims of general societal discrimination – and even generalized assertions about discrimination in an entire industry – cannot be used to justify race-conscious remedial measures. *See Croson*, 488 U.S. at 498 ("[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It has no logical stopping point. 'Relief' for such an ill-defined wrong could extend until the percentage of public contracts awarded to [minorities] . . . mirrored the percentage of minorities in the population as a whole." (internal quotation marks and citation omitted)); *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996) ("an effort to alleviate the effects of societal discrimination is not a compelling interest"); *Wygant*, 476 U.S. at 276 (plurality op. of Powell, J.) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

The record is therefore devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry. We must therefore conclude that Washington's application of TEA-21 conflicts with the guarantees of equal protection because the State's DBE program is not narrowly tailored to further Congress's remedial objective. The "exact connection" between means and ends that is a prerequisite to the use of racial classifications is demonstrably absent from Washington's

DBE program. *Gratz*, 539 U.S. at 270 (internal quotation marks omitted).[12]

VI

Western States' facial challenge fails because Congress identified a compelling remedial interest when it enacted TEA-21 and the DBE program established by the USDOT's regulations is – on its face – a narrowly tailored means of achieving that objective. We therefore affirm summary judgment in favor of the United States, the USDOT, and the Federal Highway Administration.

The State of Washington, however, has not proffered any evidence of discrimination within its own contracting market and has thus failed to meet its burden of demonstrating that its DBE program is narrowly tailored to further Congress's compelling remedial interest. We therefore reverse the district court's grant of summary judgment as to the WSDOT, the City of Vancouver, and Clark County, and remand this matter to the district court with instructions to enter summary judgment in favor of Western States on its as-applied challenge.[13] *See Dewitt*

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[12] The State's failure to present evidence of discrimination against *any* minority group alleviates the need for us to undertake a separate inquiry into whether the Washington DBE program's definition of presumptively disadvantaged groups is overbroad.

[13] The city and county argue that they are entitled to summary judgment on Western States' damages claims because there is no evidence that they engaged in intentional racial discrimination. The district court did not reach this issue and instead dismissed the damages claims because they "hinge upon the assertion that TEA-21 is unconstitutional." Dist. Ct. Order 18. Although this Court "may affirm summary judgment on an alternative ground to that given by the district court if the record fairly supports the alternative ground," *Gulf*

(Continued on following page)

Constr. Inc. v. Charter Oak Fire Ins. Co., 307 F.3d 1127, 1135 n.6 (9th Cir. 2002) (directing the district court on remand to grant partial summary judgment where there were no disputed issues of material fact).

AFFIRMED in part, **REVERSED** in part, and **REMANDED** for further proceedings consistent with this opinion.[14]

McKAY, Circuit Judge, concurring in part dissenting in part:

I agree with the majority's discussion of the facial constitutionality of TEA-21. However, as to its "as-applied" discussion, the majority opinion splits the circuits without persuasive support for its position. I am persuaded by the position taken by both the Sixth and Seventh Circuits, and therefore dissent in part.

The flaw that I see in the majority's opinion is its improper reliance on cases that are inapposite. Cases like *Monterey Mechanical Co., Builders Ass'n of Greater Chicago, Drabik, O'Donnell Construction Co.*, and *Croson* concern the constitutionality of state, municipal or county race-based remedial statutes or ordinances. The statute at

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USA Corp. v. Fed. Ins. Co., 259 F.3d 1049, 1060 n.13 (9th Cir. 2001), we need not decide whether it would be appropriate to do so here. It will be necessary on remand for the district court to address the State's liability for damages, and thus we also remand Western States' damages claims against the city and county to allow the district court to resolve all aspects of this issue in the first instance.

[14] Each party shall bear its own costs on appeal. *See* Fed. R. App. P. 39(a)(4).

issue in this appeal is a national, congressionally mandated statute. The importance of this distinction was appropriately noted in *Tennessee Asphalt Co. v. Farris:*

> [T]he joint lesson of *Fullilove* and *Croson* [is] that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. And one way it can do that is by authorizing states to do things that they could not do without federal authorization.

Farris, 942 F.2d 969, 975 (6th Cir. 1991) (quoting *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 423-24 (7th Cir. 1991)) (internal quotations omitted).

The majority discounts the importance of *Farris* because of its reliance on *Milwaukee County Pavers*. Maj. Op. at 5027-28 n.9. The majority opines that it is improper to rely on *Milwaukee County Pavers* because it did not involve an "as-applied" challenge. *Id.* I respectfully disagree.

Reading *Milwaukee County Pavers* as not discussing an as-applied challenge focuses too much on the opinion's form instead of on its substance. This error is likely due to a slip of the authoring judge's pen. The court, after stating that the plaintiffs did not "challenge the Act . . . on its face [or] as applied[,]" phrased the plaintiffs' argument as whether Supreme Court precedent demonstrates that "the set-aside program, *as implemented in Wisconsin*, is necessary to rectify invidious discrimination." *Milwaukee County Pavers*, 922 F.2d at 423 (emphasis added). Whether the parties, or the court for that matter, use "proper" phraseology in articulating their arguments is, to me,

irrelevant. Recognizing the apparent conflict of words in the opinion, I am forced to rely on the opinion's substance.

The clear substance of the opinion in *Milwaukee County Pavers* concerns an as-applied challenge to a congressional enactment sought to remedy past discrimination. The plaintiffs did not "challenge the validity of the federal statute or regulations" because their only concern was how the presumptively valid federal statutory and regulatory laws were being implemented (or applied) by the state of Wisconsin. *Id.* The plaintiffs' argument in *Milwaukee County Pavers*, quoted below, is strikingly similar to the argument presented in this case.

> The [plaintiffs] point out that the remedial objective . . . may be a fiction when it is applied to a liberal northern state with a relatively small minority population . . . that does not even attempt to ascertain the existence of a legacy of discrimination that might justify favored treatment for highway construction firms owned by blacks, or Hispanics, or American Indians, or Asians, or women.

Id. at 424. I see no difference between that argument and the one presented by Plaintiffs in our case. I also agree with the reasoning articulated in *Milwaukee County Pavers* that only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge. *Id.* at 423-24.

In addition, the case relied upon by the majority to support their contention that an as-applied challenge is required supports my conclusion. In *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964,

968 (8th Cir. 2003), the Eighth Circuit analyzed the affirmative action "program as implemented"[1] by Minnesota and Nebraska. In performing that analysis, the Eighth Circuit was concerned with whether the individual state followed the appropriate regulations, *not* with whether there was sufficient information to establish past discrimination within the state. *See Sherbrooke Turf*, 345 F.3d at 973 (explaining that MnDOT and NDOR each commissioned an independent expert to ensure compliance with 49 C.F.R. § 26.45(c)).

It cannot be legitimately disputed that Defendants have complied with TEA-21 and its implementing regulations. If the Plaintiffs are concerned that certain "minorities" are being "provide[d] an unconstitutional windfall . . . solely on the basis of their race or sex," Maj. Op. at 5028, then they should follow the procedure outlined in the Code of Federal Regulations and attempt to rebut the presumption of disadvantage, not file a federal lawsuit. *See* 49 C.F.R. § 26.67(b).

I respectfully dissent.

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[1] I find it ironic that the actual language used in *Sherbrooke*, "as implemented," is the same as that used in *Milwaukee County Pavers*, despite the majority's contention that they stand for different propositions.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WESTERN STATES PAVING CO. INC.,

Plaintiff-Appellant,

v.

WA ST DEPARTMENT OF TRANSPORTATION; et al.,

Defendants-Appellees,

UNITED STATES OF AMERICA; et al.,

Defendant-Intervenors-Appellees.

No. 03-35783
D.C. No.
CV-00-05204-RBL

JUDGMENT

(Filed Aug. 22, 2005)

Appeal from the United States District Court for the Western District of Washington (Tacoma).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Tacoma) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby **is AFFIRMED IN PART, REVERSED IN PART, REMANDED.**

Filed and entered Monday, May 09, 2005

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WESTERN STATES PAVING CO., INC., Plaintiff, v. THE WASHINGTON DEPARTMENT OF TRANSPORTATION; DOUGLAS MACDONALD, Secretary of the Washington Department of Transportation; and the CITY OF VANCOUVER, WASHINGTON; CLARK COUNTY, Defendants. and UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF TRANSPORTATION, and FEDERAL HIGHWAY ADMINISTRATION, Intervenors.	Case No. C00-5204 RBL ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Pursuant to the Mandate issued by the Ninth Circuit Court of Appeals and for the reasons cited in that Court's Opinion of May 9, 2005, this Court now **VACATES** its Order Granting Summary Judgment in favor of the Washington Department of Transportation, the City of

Vancouver and Clark County and enters this Order Granting Partial Summary judgment on the issue of liability in favor of plaintiff and against the Washington Department of Transportation, the City of Vancouver and Clark County. This Court's judgment in favor of the Intervenors, United States of America, United States Department of Transportation, and the Federal Highway Administration is not affected by this Order.

The Clerk of the Court is directed to issue a new Scheduling Order to the remaining parties.

Dated this 12th day of September, 2005.

/s/ Ronald B. Leighton
RONALD B. LEIGHTON
UNITED STATES
DISTRICT JUDGE

United States District Court

WESTERN DISTRICT OF WASHINGTON

JUDGMENT IN A CIVIL CASE

WESTERN STATES PAVING CO., INC.,

CASE NUMBER: C00-5204RBL

v.

THE WASHINGTON DEPARTMENT OF TRANSPORTATION, et al.,

[✓] **Decision by Court.** This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court GRANTS the Defendants' Motions for Summary Judgment declaring TEA-21 and its regulations to be constitutional on its face and as applied. Plaintiff's claim for compensatory damages under 42 U.S.C. § 1981, § 1983 and 42 U.S.C. 2000(d) all hinge upon the assertion that TEA-21 is unconstitutional. Those claims are **DISMISSED.** Finally, plaintiff's state law claim under RCW 49.60.400 is likewise **DISMISSED.**

SEPTEMBER 9, 2003
Date

BRUCE RIFKIN
Clerk

/s/Jean Boring
(By) Deputy Clerk,
Jean Boring

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WESTERN STATES PAVING CO., INC., Plaintiff, v. THE WASHINGTON DEPARTMENT OF TRANSPORTATION; DOUGLAS MACDONALD, Secretary of the Washington Department of Transportation; and the CITY OF VANCOUVER, WASHINGTON; CLARK COUNTY, Defendants, and UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF TRANSPORTATION, and FEDERAL HIGHWAY ADMINISTRATION, Intervenors.	Case No. C00-5204 RBL ORDER GRANTING SUMMARY JUDGMENT 00-CV-05204-ORD

(Dated Sep 03, 2003)

SUMMARY

This case challenges the constitutionality of the Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107 (TEA-21). The case was brought by

an asphalt and paving contractor, Western States Paving Co., Inc., initially against the Washington Department of Transportation (WSDOT) and the City of Vancouver, alleging that in March 1999 it was denied subcontracting work on a federally-funded highway project because TEA-21 as administered by WSDOT and Vancouver required that a specified percentage of the total contract be awarded to Disadvantaged Business Enterprises (DBE). Plaintiff alleges that the DBE utilization goal on the contract imposed the use of race and gender as factors in the award and performance of contracts in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Because the complaint challenged the constitutionality of a federal statute, this Court granted a motion to intervene brought by the United States, United States Department of Transportation and the Federal Highway Administration (federal defendants) (Docket No. 16). The Complaint was then amended to add Clark County as a defendant and to expand the number of subcontracts lost to DBEs to three (Docket No. 31).

The Federal defendants bring this Motion for Summary Judgment seeking a declaration from the Court upholding the constitutionality of TEA-21 on its face and as applied. Their motion is joined by the state and local defendants who seek dismissal of plaintiff's complaint. In their motions for summary judgment, all defendants rely heavily on the decision from the 10th Circuit in *Adarand v. Slater*, 228 F.3d 1147, (10th Cir. 2000) (Adarand VII), cert. dismissed as improvidently granted, 534 U.S. 103, 122 S. Ct. 511, L. Ed. 2d (2001). In Adarand VII the 10th

Circuit held that the TEA-21 legislation was constitutional. For the reasons cited below, this Court finds that TEA-21 is constitutional on its face and as applied.

TEA-21

TEA-21 is just one of several federal highway funding acts adopted over the past twenty-five years that provide a mechanism for targeting a portion of appropriated federal highway funds to contractors and/or subcontractors who are socially and economically disadvantaged.

In 1982, Congress passed the Surface Transportation Assistance Act (STAA), Pub. L. No. 97-424, 96 Stat. 2097. The Act required that no less than 10% of its appropriated funds be expended on Disadvantaged Business Enterprises (DBE) as that term was defined in the Small Business Act (SBA). The SBA presumes that certain classes of individuals are socially and economically disadvantaged. These groups are Black Americans, Hispanic Americans, Native Americans and Asian Pacific Americans.

In 1987, Congress adopted the Surface Transportation and Uniform Relocation Assistance Act (STURAA), Pub. L. No. 100-17, 101 Stat. 132. STURAA included the requirement that not less than 10% of appropriated federal funds be expended through DBEs and expanded the definition of DBEs to include women.

In 1991, Congress enacted the Intermodal Surface Transportation Efficiency Act (ISTEA), Pub.L. No. 102-240, 105 Stat. 1914. Again, Congress directed recipient-states to channel not less than 10% of its federal highway construction funds through DBEs.

In 1998, TEA-21 was enacted by Congress, Pub. L. No. 105-178, 112 Stat. 107 (1998). Section 1101(b) provides that "except to the extent the secretary determines otherwise, not less than 10 percent of the amounts available" for highway and transportation projects "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." The definitions of "small business" and "socially and economically disadvantaged individual" contained in the Small Business Act (SBA), 15 U.S.C. § 631, are incorporated.

A business is "small" if it is independently owned and operated, not dominant in its field of operation, and if the number of employees and receipts are below a specified level. 15 U.S.C. § 632(a)(1). To be "economically disadvantaged" a person must have a personal net worth of less than $750,000, excluding place of business, personal residence or assets of the spouse. "Socially disadvantaged individuals" are defined as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." Five groups, comprising thirty-seven subgroups, are presumed to be socially and economically disadvantaged. Individuals who are not members of the presumptively disadvantaged groups may apply and prove DBE disadvantaged status based upon "race, ethnic origin, gender, disability, long-term residence in an environment isolated from mainstream society." 49 C.F.R. § 26.67 APPENDIX E.

Regulations promulgated by the United States Department of Transportation to implement TEA-21's DBE program are aimed at tailoring the program to pass constitutional muster. Pursuant to the regulations:

- Receipt of federal highway funds is conditioned on the states establishing a DBE program, 49 C.F.R. § 26.21;
- The 10% target is only aspirational and the goal does not authorize or require recipients to set overall or contract goals at the 10% level, 49 C.F.R. § 26.41;
- Recipients cannot be penalized because DBE participation falls short of the overall goal, unless the recipient fails to administer the program in good faith, 49 C.F.R. § 26.47(a);
- If a state's annual projected goal can be achieved through race-neutral means, the state must implement its contract without including goals during that year, 49 C.F.R. § 26.51(f);
- States are encouraged to meet their DBE goals through race-neutral measures, 49 C.F.R. §26.51(a);
- States are prohibited from using race-conscious goals where there is no evidence of discrimination or the effects of past discrimination, 49 C.F.R. § 26.45.

These regulations were first published in the Federal Register on February 2, 1999.

Washington's DBE Program

By Executive Order dated July 26, 1999, the Washington State Secretary of Transportation adopted a plan implementing a Disadvantaged Business Enterprise Program for the State of Washington. One purpose of the Plan was "to provide assurances to the U.S. Department

of Transportation (USDOT) that WSDOT and its sub-recipients of federal financial assistance will comply with federal mandates regarding the DBE Program." "Disadvantaged Business Enterprise Program Participation Plan," (WSDOT, Feb. 2000). Ex. 4 to Sworn State. of Gary E. Lofland. The Executive Order and resulting plan was a direct response to the publication of the aforementioned USDOT regulations in the Federal Register. That event established the requirement that all recipients of USDOT program funds establish a DBE program.

Washington's DBE Program was patterned after a "Sample DBE Program" developed by the U.S. Department of Transportation (DOT) and provided to the states as an example of a legally sufficient DBE Program under the regulations. Decl. of Robert C. Ashby ¶ 8. The DOT DBE regulation provides that the Department may issue written interpretations or guidance on the DBE regulation, which are "valid and binding, and constitute the official position of the Department of Transportation" in circumstances where the General Counsel of the Department of Transportation has reviewed the document and "approved it as consistent with the language and intent of 49 C.F.R. Part 26" 49 C.F.R. § 26.9(b). The DOT Sample DBE Program was subjected to such review. The DOT Sample DBE Program states that "recipients may wish to use [the sample program] as a guide" and that "[t]he General Counsel of the Department of Transportation has reviewed this sample program and approved it as consistent with the language and intent of 49 C.F.R. Part 26." *See* Decl. of Robert C. Ashby ¶¶ 8-9.

In addition to closely following the sample DBE Program documents crafted by DOT, the State of Washington officials were in close consultation with DOT legal

counsel and representatives of the Federal Highway Administration responsible for reviewing and approving the State of Washington's DBE Program. All parties to the litigation agree that the Washington DBE plan is consistent with the requirements imposed by the DOT's DBE regulations.

Pursuant to those regulations, the Washington State Department of Transportation (WSDOT) has established aspirational goals for DBE participation in Federally-assisted highway projects for fiscal years 2000 through 2003. Each of these specific goals has been reviewed and approved by DOT. To establish an overall goal for DBE participation in a DOT-assisted contract, the recipient must demonstrate the availability of ready, willing and able DBE's relative to all businesses ready, willing and able to participate in the DOT-assisted contract. In order to establish its overall goals, WSDOT follows the goal-setting procedures set forth in the regulations, using its existing DBE directory of certified firms and census data for WSDOT's market area to determine the availability of DBEs in its market. To determine the number of all businesses ready, willing and able to participate in DOT-assisted projects, WSDOT used its bidder list consisting of successful prime contractors' identification of all firms (successful and unsuccessful) that bid or quote subcontracts on USDOT-assisted projects and the WSDOT's database of all firms that have bid or quoted contracts to the State or its sub-recipients. WSDOT then weighs the percentage of available firms by federal dollars spent in the respective contracting categories. This calculation provides a base figure expressed as a percentage and expressing the ratio of DBEs to all businesses in the relevant industry. In 2000 that base figure was 11.17%.

See Decl. of Robert C. Ashby ¶4. For 2003 the number was 15%. See Pl.'s Memo. in Oppo. to S.J., 4:5-8.

Once a base figure is established, the regulation requires that the recipient examine all evidence available in the jurisdiction to determine what adjustment, if any, is needed to the base figure in order to reflect the level of DBE participation one would expect absent the effects of discrimination. Such evidence might include information available to WSDOT from related fields that affect DBE opportunities to form, grow and compete, such as the ability to obtain bonding, financing and insurance or to get training or union membership. In 2000, WSDOT adjusted the base figure upward from 11.17% to 14% to reflect a number of factors including newly-adopted regulations imposing a personal net worth limitation on DBE eligibility. By contrast, in 2003, WSDOT determined that there was no reliable information available upon which to justify a "step 2" adjustment. Specifically, there were no disparity studies of discrimination in the jurisdiction which were completed, current, relevant or reliable to provide any basis for an adjustment. Moreover, past participation of DBEs in WSDOT projects as a measure of current capacity of DBEs was deemed unreliable for a number of reasons not important for this analysis. Suffice it to say, for 2003, WSDOT did not believe it had demonstrable evidence that logically and directly pointed to the need to adjust the base line figure to account for past effects of discrimination. See Rep. Collette Holt, p.4; Ex. 2 to Decl. Steve Dietrich.

In establishing its annual DBE aspirational goals, WSDOT consulted with minority, women's and general contractor groups, community organizations and other groups which could be expected to have information

concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs and Washington's efforts to establish a level playing field for the participation of DBEs. It also opened the process up for public comment, all in compliance with 49 C.F.R. § 26.45(g)(1) and (2).

The overall goal for 2000 was 14% of DBE participation in Federally-assisted projects. The goal for 2003 was 15%. These overall aspirational goals were approved by DOT.

The regulations require that recipients meet as much of their overall goal as possible through race-neutral measures rather than race-conscious means. 49 C.F.R. § 26.51(a). A "race-neutral" method is one that is, or can be, used to assist all small businesses while "race-conscious" tools focus specifically on benefitting a DBE. 49 C.F.R. § 26.5. Again, the DOT has provided guidance for recipients to use in analyzing the extent to which goals can be met through race-neutral and gender-neutral means. The regulations authorize the recipient to consider DBE participation levels on contracts without race-conscious goals (affirmative action) when determining what portion of the aspirational goal can be attained by race-neutral means. The balance of the goal may be achieved by race-conscious goals which require prime contractors to use bids from DBEs.

In 2000, WSDOT determined that achievement of the 14% level of DBE participation would be attained through both race-neutral means (9%) and race-conscious means (5%). See Declaration of Robert C. Ashby, p.5. In 2003, race-neutral means were to account for 4.55% of the goal and the balance would be achieved through race-conscious

means. See Rep. of Collette Holt, p.4, Ex. 2 to Decl. Steve Dietrich.

The Claim

The plaintiff, Western States Paving, is a Vancouver-based asphalt and paving contractor. It regularly bids for work on public contracts, including federally-assisted road construction projects. It is not a Disadvantaged Business Enterprise (DBE). On three occasions between March 1999 and August 2000, Western States submitted the low bid for asphalt and paving work on federally-assisted projects only to be rejected in favor of a higher bid submitted by a DBE. Each project included a race-conscious contract goal which specified that a fixed percentage of the total contract be awarded to DBEs: Plaintiff filed this suit challenging the constitutionality of the contract requirements that contractors use race and gender based criteria as factors when awarding contracts. Plaintiff claims such practices violate the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution, as well as federal and state civil rights statutes. 42 U.S.C. § 1981; 42 U.S.C. § 1983; 42 U.S.C. § 2000(d); Wash. Rev. Code § 49.60 (Washington Proposition 200) – plaintiff seeks monetary damages, attorney's fees and costs in addition to declaratory and injunctive relief.

Summary Judgment Standard

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving

party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c) (1987). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d. 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e) (1987). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 S. 242 [sic], 253, 477 U.S. 242, 253, 106 S. Ct. 2505, 2512-2513, 91 L. Ed. 2d 202 (1986); *T.W. Elec. Service Inc. v. Pacific Elec. Contractors Assn.*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the

hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific statements in affdavits [sic] are not sufficient, and "missing facts" will not be "presumed." *Lujan v. Natl. Wildlife Fedn.*, 497 U.S. 871, 888-89, 110 S. Ct. 3177, 3188-3189, 111 L. Ed. 2d 695 (1990).

Strict Scrutiny Standard

The United States Supreme Court has established a "strict scrutiny" test to be applied to race-conscious remedial legislation. In *Adarand III*, 515 U.S. 200, 235, 115 S. Ct. 2097, 2117, 132 L. Ed. 2d 158 (1995), the Court held that "federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." Once the governmental entity has shown proof of compelling interest in remedying past discrimination, and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Majestic v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000). The compelling interest inquiry is a question of law. As such, federal courts do not measure the substantiality of Congress's interests by requiring Congress to prove its interest in *de novo* trial. Instead, federal courts examine first the evidence before Congress then review any further evidence necessary to resolve the matter. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196, 117 S. Ct. 1174, 1190, 137 L. Ed. 2d. 369 (1997).

Compelling Government Interest

The Court's attention has been directed to three Court decisions which directly implicate the constitutionality of the Transportation Equity Act for the 21st Century and the accompanying administrative regulations. *Adarand v. Slater,* 228 F.3d 1147 (10th Cir. 2000); *Sherbrooke Turf Inc. v. Minn. Dept. of Transp.,* 2001 WL 15028421 at *5 (D. Minn. November 15, 2001); and *Gross Seed Co. v. Neb. Dept. of Roads,* No. 4:00 CV 3073, Mem. Op. at 12 (May 26, 2002)[1]. Each found the statute and its regulations to be constitutionally valid. In *Adarand VII,* the Tenth Circuit Court of Appeals provided a comprehensive analysis of the efforts undertaken by the legislative and executive branches of the federal government to use race-conscious means to remedy the effects of historical and present-day racial discrimination as manifested in the highway construction industry. *Adarand v. Slater (Adarand VII),* 228 F.3d 1147 (10th Cir. 2000). The Court also conducted an exhaustive review of the evidence reviewed, and the findings made by Congress, before adopting TEA-21 as the law of the land.

In its opinion, the 10th Circuit outlined a four-part inquiry into the question of whether the interest served by use of race-conscious goals can properly be described as compelling. First, the Court looked at the governing case law and determined that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the

[1] The two district court decisions (*Sherbrooke Turf* and *Gross Seed*) are currently on appeal before the Court of Appeals for the Eighth Circuit. Oral argument was heard on May 15, 2003.

government contracting markets created by its disbursements. This compelling state interest was specifically recognized in Justice O'Connor's opinion in *City of Richmond v. Croson,* 488 U.S. 469, 492, 109 S. Ct. 706, 102 L. Ed. 2d. 854 (1989). The Court next defined the geographic scope of Congress's reach in its effort to redress the effects of discrimination. The Court rejected Adarand's argument that specific findings regarding both discrimination and the availability of qualified DBEs in a particular local market were necessary prerequisites to any government action. The geographic scope of Congress's reach was determined to be society-wide and therefore nationwide. *Adarand VII,* 229 F.3d at 1165. Step 3 of the inquiry involved an evaluation of the actual evidence proffered by the government to support the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. The Court considered both direct and circumstantial evidence, statistical and anecdotal evidence. The Court in *Adarand VII* found that Congress had before it a strong basis in evidence for its conclusion that remedial action was necessary. It cited numerous congressional investigations and hearings as well as outside studies of statistical and anecdotal evidence compiled in "The Compelling Interest for Affirmative Action in Federal Procurement", 61 Fed. Reg. 26042, 26050-26052, and nn. 12-21 (May 23, 1996). The Court also identified statements made by Congressional Reports or members of Congress. See for example, "Barriers to Full Minority Participation in Federally Funded Highway Contracts: Hearing Before a Subcomm. Of the House Comm. On Gov't. Operations," 100th Cong. (April 1, 1998); "Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Commerce, Consumer and Monetary

Affairs Subcomm. Of the House Comm. On Gov't. Operations," 103d Cong. (July 12, 1993). The Court took judicial notice of the content of hearings and testimony before the congressional committees and subcommittees. The evidence presented to the Court convinced it that there were several discriminatory barriers which put minority and women-owned businesses at a competitive disadvantage in the marketplace. These barriers included: (a) private discrimination that impedes the formation of qualified minority subcontracting enterprises; (b) private discrimination that prevents fair competition between minority and non-minority subcontracting enterprises when competing for public construction contracts, and (c) discriminatory exclusion inferred from disparity studies showing the difference between minority subcontracting awards with and without affirmative action requirements. *Adarand VII*, 228 F.3d at 1168. With regard to this last point, the *Croson* majority stated that "where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government's] prime contractors, an inference of discriminatory exclusion could arise." 488 U.S. at 509, 109 S. Ct. at 703 (Op. of O'Connor, J.).

On the strength of the evidence adduced in the first three stages of the strict scrutiny analysis, the 10th Circuit concluded that the government had met its initial burden of presenting a "strong basis in evidence" sufficient to support its articulated, constitutionally valid, compelling interest. *Adarand VII*, 228 F.3d at 1174-75. The burden thus shifted to Adarand in the fourth prong of the inquiry to introduce credible, particularized evidence to

rebut the government's case. The Court rejected Adarand's characterization of various congressional reports and findings as conclusory and its criticism of the methodology of the various disparity studies introduced by the government and its *amici curiae*. Likewise, the Court rejected Adarand's assertion that Congress had to make specific findings regarding discrimination against each subcategory of individuals within the various ethnic categories recognized by the statute as socially or economically disadvantaged. The Court concluded that the government satisfied its burden of production regarding the compelling state interest necessary to justify a race-conscious remedy and no evidence presented by Adarand demonstrated that the affirmative action program was unconstitutional. *Adarand VII*, 228 F.3d at 1176.

In the case at bar, the federal defendants rely heavily on the evidence presented to the Court in *Adarand VII* and urge this Court to decide this case consistent with the opinion of the 10th Circuit. Plaintiff, on the other hand, suggests that the Court rigorously examine every single piece of information before Congress and evaluate its relevance and/or accuracy before siding with the government. Plaintiff directs the Court's attention to the opinion of Judge Michel in *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 262 F.3d 1306 (Fed. Cir. 2001) and urges it to set forth detailed findings as to the scope and content of the reports before Congress when it enacted the challenged legislation, and set forth whatever inferences may be drawn as to whether such reports could constitute a strong basis in evidentiary justifying remedial action.

The Court notes that everything submitted by the parties has been read and reviewed in detail. Moreover, even the plaintiff conceded in its opening brief that the

issue of constitutionality of TEA-21 is appropriate for summary disposition and that "all evidence necessary for a determination is before the Court." Pl.'s Mem. in Oppo. to S.J., 6:16-17. Finally, the Court has read Judge Michel's opinion in *Rothe* and believes that the rigorous inquiry suggested for the district court there has been met here. Specifically, this Court has not based its finding of compelling interest upon post-enactment evidence not available to the Congress when enacting TEA-21. This Court has not given deference to Congress's finding of a compelling interest or its conclusion that its remedy is narrowly tailored to that interest. Like the Court in *Rothe*, this Court holds that Congress is entitled to no deference in determining whether Congress had a compelling interest in enacting the racial classification, or that the classification was narrowly tailored in fulfillment of that interest. Rather, this Court has undertaken the same "detailed, skeptical, non-deferential analysis" recommended by Judge Michel and actually performed by the 10th Circuit in *Adarand VII*. This Court has, however, given some deference to Congress's fact-finding process in connection with TEA-21.[2] The Court has also given deference to the comprehensive analysis and findings of the *Adarand VII* Court. This Court has reviewed the evidence before Congress at the time TEA-21 was enacted and has applied the rigorous requirements of strict scrutiny as set forth in *Croson* and its progeny. The Court is convinced that TEA-21 is a response to Congress's compelling interest in not perpetuating the effects of racial discrimination in its own

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[2] "The fact-finding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary." See *Croson*, 488 U.S. at 500, 109 S. Ct. at 725.

distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. Congress reviewed studies and statistics from all regions of the republic. These studies demonstrated that the effects of private discrimination spanning many years had impeded the ability of DBEs to compete in the highway construction marketplace. The effects of this discrimination were manifested in virtually every aspect of business formation and operation, including, but not limited to: financing, bonding, purchasing, insuring, training and even union membership. By way of confirmation of these affirmative findings, the Court was particularly influenced by statistics showing that when affirmative action programs were removed, DBE participation fell well below the percentage of DBEs ready, willing and able to fully participate in the marketplace. While neither statistical studies nor anecdotal evidence are unassailable standing alone, together they present an impressive body of evidence concerning the effects of private discrimination on the ability of disadvantaged businesses to compete in the marketplace. The 2001 GAO study (noting methodology weaknesses or limits in the data) was taken into account by the Court. That report, however, does not persuade the Court that Congress lacked substantial evidence upon which to base its compelling interest in enacting TEA-21 in response to the aforementioned effects of discrimination in the highway construction industry. The compelling interest requirement of the strict scrutiny analysis has been met.

Narrow Tailoring

In *Adarand III*, the Supreme Court stated that "when race-based action is necessary to further a compelling

interest, such action is within constitutional constraints if it satisfied the narrow tailoring test set out by previous Supreme Court decisions." *Adarand III*, 515 U.S. at 237, 115 S. Ct. at 2117. According to the Supreme Court, the narrow tailoring test requires "inquiry into whether or not the particular DBE seeking racial preference has suffered from the effects of past discrimination." *Croson*, 488 U.S. at 508, 109 S. Ct. at 729. Thus, a "broad program that sweeps all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny." *Hopwood v. Texas*, 78 F.3d 392, 951 (5th Cir. 1996). In *U.S. v. Paradise*, 480 U.S. 149, 171, 107 S. Ct. 1053, 1066, 94 L. Ed. 2d 203 (1987), the Court suggested five factors for determining whether a race-conscious remedy passes the "narrow tailoring" test: (a) the necessity for relief and efficacy of alternative remedies; (b) the flexibility of the relief, including the availability of waiver provisions; (c) the duration of the planned relief; (d) the relationship of numerical goals to the relevant labor market; and (e) the impact of the relief on third parties. Justice O'Connor's opinion in *Croson* mentions an additional factor which is particularly relevant here: over-or under-inclusiveness; i.e., whether the individuals who participate in the DBE program have themselves been affected by past discrimination. *Croson*, 488 U.S. at 508, 1095 S. Ct. at 729.

(a) Alternative Remedies

TEA-21 and its implementing regulations require recipients to consider and use race-neutral devices to the maximum extent feasible for increasing opportunities for DBEs and for meeting aspirational goals established by the recipient agency. 49 C.F.R. § 26.51. Indeed, recipients

are required to give priority to race-neutral means and are authorized to use race-conscious methods, i.e., contract goals, only if they cannot meet their overall goals with race-neutral methods. 49 C.F.R. § 26.51(d). According to the government, at least seven states currently achieve their aspirational goals without resorting at all to race-conscious measures. The TEA-21 regulations are replete with examples of race-neutral measures that are available to recipients as they formulate annual goals and adopt plans to achieve the goal of enhancing opportunities for DBEs. Sadly, almost five decades of experience with race-neutral measures dating back to the 1958 enactment of the Small Business Act underscores the need to use race-conscious remedies to augment the measured benefits that are attained using only the preferred race-neutral tools available under the TEA-21 regulations. Congress adequately considered and promoted race-neutral alternative remedies.

(b) Flexibility of Relief Including Waiver Provisions

Pursuant to 49 C.F.R. § 26.15, recipients of federal highway construction funds can seek waivers and exemptions from nearly every aspect of the DBE program, including contract goals. For example, a recipient cannot be penalized or found in non-compliance for failure to meet its annual DBE allocation goal, provided it has operated in good faith. 49 C.F.R. § 26.47(a). Recipients may not deny a contract to a bidder that demonstrated that it has made good faith efforts to achieve the contract goal, even if it was unable to meet that goal. 49 C.F.R. § 26.53(a)(2). Plaintiff argues that meeting the good faith requirements is "onerous" and the state acknowledges that virtually all contractors meet the goal by selecting DBEs to perform

the targeted volume of contract work. Nevertheless, the availability of the good faith exception allows flexibility when a contract goal in a specific locale is inappropriate given the absence of DBEs ready, willing and able to perform the work in a remote part of the state. Finally, prime contractors are not required to accept higher quotes from DBEs if the price difference is excessive or unreasonable. 49 C.F.R. Appendix A to Part 26 – "Guidance Concerning Good Faith Efforts," at IV.D.(2). The DBE program meets this prong of the narrow tailoring test.

(c) Duration of the Planned Relief

The authorization from §1101(b) of TEA-21 expires on September 30, 2003. It was enacted in 1998. No one has argued that this limited period is excessive or exceptional. Rather, plaintiff argues that it may be reauthorized in brief segments in perpetuity without ever narrowly tailoring the program to end when the effects of discrimination in the industry ceases to be a problem. The Court believes that the necessity of Congressional oversight and action if the program is to continue fulfills the limited duration prong of the narrow tailoring test.

Moreover, this Court agrees with the *Adarand VII* Court which pointed out that certification requirements for continuing DBE status and the effectiveness of particular DBE programs are also potentially relevant to the issue of TEA-21's duration. First, each DBE is limited by regulation to 10-½ years and each DBE must establish its continuing eligibility annually. See *Adarand VII*, 228 F.3d at 1179. If a DBE fails to establish eligibility because personal net worth or business volume rises, the program ends for that DBE. Similarly, if a state is able to reach its

goals through race-neutral means in two consecutive years, that state's TEA-21 DBE program terminates insofar as the use of race-conscious methods is concerned. Race-conscious methods cannot be used until race-neutral methods fail to meet the goal in a later year. See 49 C.F.R. § 26.51(f)(3). The statute and its regulations contain many checks and balances to ensure that the program does not outlive its usefulness.

(d) Relationship of Numerical Goals to the Relevant Labor Market

TEA-21 and its implementing regulations give to the recipient states or agencies the authority and the tools to fix aspirational goals at a level DBEs would be expected to achieve in the marketplace absent the effects of discrimination. 49 C.F.R. § 26.45. Figures are adjusted to account for the effects of non-discriminatory factors causing underutilization of DBEs in an effort to make the goal for DBE participation in up-coming federally-funded contracts as accurate as possible. Once the overall goal is set, the balance between race-neutral and race-conscious methods is selected. This process includes a review of DBE allocations in contracts where no affirmative action requirement is in place; i.e., state funded contracts. That percentage provides a useful measure of the efficiency of race-neutral methods in meeting the objectives of TEA-21. The balance of the goal may be achieved by race-conscious methods. The entire goal setting process involves representatives of affected minority groups and industry officials. TEA-21 and its regulatory scheme give recipients every opportunity to tailor their goals to the realities of the marketplace in their locale.

(e) Impact on Third Parties

The DBE programs enacted by recipient states and agencies clearly create the possibility that some DBEs may be hired in lieu of non-DBEs who would otherwise have been awarded a contract. The possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Adarand VII,* 228 F.3d at 1183. "To invalidate . . . DBE programs on that basis would be to render strict scrutiny effectively fatal in contravention of Justice O'Connor's clear statements to the contrary." *Adarand VII,* 228 F.3d at 1183 (citation omitted).

TEA-21 and its regulations provide for relief to non-DBEs in three respects: first, proof of social disadvantage by those not presumed so under the regulations may be shown by a preponderance of the evidence. 49 C.F.R. § 26.61(d), 26.67(d). Second, a financial limitation is imposed to protect non-DBEs from well-funded, non-disadvantaged minority businesses. Finally, the regulations also require recipients to ensure that DBEs are not so over-concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate. 49 C.F.R. § 26.33(a). While plaintiff claims that proving disadvantage is an option seldom exercised by those not presumed to be disadvantaged, it does appear that the regulations make a significant effort to minimize the impact of the DBE program on non-DBEs.

Over-or Under Inclusiveness

The Supreme Court in *Croson* expressed the concern that a government entity undertake the necessary

administrative effort to tailor remedial relief to those who truly have suffered from the effects of prior discrimination. 488 U.S. at 408, 109 S. Ct. at 729-730. TEA-21 meets that concern in one useful respect by imposing an economic limitation ($750,000 net worth) for DBE certification. Thus, successful enterprises run by women or minorities are excluded from the assistance they presumably don't need. With the individualized determination of economic disadvantage, according to the *Adarand VII* Court, the main obstacle to a finding of narrow tailoring has disappeared. *Adarand VII,* 228 F.3d at 1185.

Plaintiff raises an additional concern about the TEA-21 program as administered in Washington. It argues that there is no evidence of prior discrimination in the highway construction industry in Washington and therefore no evidence that any groups included in the statutory presumption suffered the effects of discrimination such that their ability to compete in the highway construction industry would be impeded. By way of demonstration, plaintiff points to answers to interrogatories supplied by the Washington State Department of Transportation and argues that because WSDOT is unaware of any discrimination in connection with WSDOT-administered contracts that any DBE program that includes race-conscious goals is not narrowly tailored. Plaintiff is wrong. As this Court has previously stated, the evidence before Congress concerned the effects of private discrimination; private discrimination that impedes the formation and growth of minority-owned businesses. The evidence in Washington strongly suggests that the effects of private discrimination continue to take a toll on DBEs. When market conditions alone dictate the selection of highway construction subcontractors, DBEs are allocated a far lesser share of

contract dollars than the percentage of ready, willing and able DBEs would indicate they would get absent the continuing effects of discrimination. As the Court in *Croson* stated:

> "Where there is significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government's] prime contractors, an inference of discriminatory exclusion could arise." 488 U.S. at 509, 109 S. Ct. at 730 (Op. of O'Connor, J.).

A state recipient of federal highway funds is not required to independently establish that its DBE program satisfied the strict scrutiny standard. *Milwaukee County Pavers Assn. v. Fiedler,* 922 F.2d 419, 423 (7th Cir. 1991). A state may participate in the federal DBE program without making the "particularized findings" of discrimination otherwise required for a race-conscious program operated by a state or local government. *Tenn. Asphalt Co. v. Farris,* 942 F.2d 969, 975 (6th Cir. 1991). Congress in establishing the national remedial program provided the factual basis for TEA-21. Congress had a substantial basis in evidence to support a compelling governmental interest in eliminating the lasting effects of discrimination in the highway construction industry. In response, it narrowly tailored a remedy to meet the problem it intended to solve. Washington's implementation of a DBE program satisfies both the letter and spirit of the federal legislation. The law meets the strict scrutiny analysis imposed upon all race-conscious legislative schemes and is constitutional as adopted and as applied.

Gender Preferences

TEA-21 includes both race-conscious and gender-conscious provisions. To sustain a classification based on gender contained in remedial legislation, the government has the burden to show "an exceedingly persuasive justification" for the classification. See *Miss. U. for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331, 3336, 73 L. Ed. 2d 1090 (1982). This level of scrutiny is referred to as intermediate inasmuch as it does not compel as rigorous an inquiry as does the strict scrutiny standard employed for classifications based upon race. Intermediate scrutiny requires that the law and its implementing regulations be substantially related to the achievement of an important government interest. *Nguyen v. I.N.S.*, 533 U.S. 53, 60, 121 S. Ct. 2053, 2059, 150 L. Ed. 2d 115 (2001). Because TEA-21 meets the more rigorous strict scrutiny standard it necessarily complies with the intermediate scrutiny reserved for gender-based classifications.

RCW 49.60.400

Plaintiff claims that the implementation of TEA-21 and the WSDOT DBE program violates provisions of the Washington Law Against Discrimination codified at RCW 49.60 *et. seq.* That law, enacted by the people through initiative process, prohibits discrimination or preference based on race or gender in the operation of public contracting. Wash. Rev. Code § 49.60.400(1). An exception was included in the law for any "action that must be taken to establish or maintain eligibility for any federal program if ineligibility would result in a loss of funds to the state." Wash. Rev. Code § 49.60.400(6).

Each year the State of Washington receives well in excess of $200 million in Federal Aid to support road construction throughout the state. According to the Executive Order that created Washington's DBE program, federal road construction dollars averaged in excess of $250 million invested in Washington between 1994 and 1998. Exh. 4 to Sworn Statement of Gary E. Lofland. The State of Washington must adopt and implement, in good faith, a DBE program as a condition to continued receipt of federal funds. 49 C.F.R. § 26.21(c). Washington's DBE Program presents precisely the kind of situation the proponents of Initiative 200 envisioned when crafting the anti-discrimination law. While it is true that TEA permits a recipient to achieve goals without resort to race-conscious methods and it provides that funds will not be withheld for failure to achieve its goals, it does require good faith efforts on the part of the recipient in order to preserve the flow of money from the federal government. No one has argued that in setting and implementing its goals, WSDOT has acted other than in a good faith attempt to comply with the broad purposes underlying the enactment of TEA-21 and the promulgation of its implementing regulations. The exception contained at Wash. Rev. Code § 49.60.400(6) applies.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Defendants' Motions for Summary Judgment (Docket Nos. 97, 99, 101 and 103) declaring TEA-21 and its regulations to be constitutional on its face and as applied. Plaintiff's claim for compensatory damages under 42 U.S.C. § 1981, § 1983 and 42 U.S.C. § 2000(d) all hinge upon the assertion that TEA-21 is unconstitutional. Those claims are

DISMISSED. Finally, plaintiff's state law claim under RCW 49.60.400 is likewise **DISMISSED**.

DATED this 3d day of September, 2003.

/s/ Ronald B. Leighton
HONORABLE
RONALD B. LEIGHTON
JUDGE, U.S. DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN STATES PAVING CO., INC., Plaintiff-Appellant, v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; CITY OF VANCOUVER, WASHINGTON; CLARK COUNTY, WASHINGTON; DOUGLAS MACDONALD, Defendants-Appellees, UNITED STATES OF AMERICAN; U.S. DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION, Defendants-Intervenors-Appellees.	No. 03-35783 D.C. No. CV-00-05204-RBL Western District of Washington, Tacoma ORDER (Filed Aug 08 2005)

Before: McKAY,* O'SCANNLAIN, and BEA, Circuit Judges.

Judges O'Scannlain and Bea have voted to deny the petitions for rehearing filed by Clark County and the City

* The Honorable Monroe G. McKay, Senior United States Circuit Judge for the Tenth Circuit, sitting by designation.

of Vancouver. Judge McKay has voted to grant the petitions.

The petitions for rehearing are therefore DENIED.

NO. 03-35783

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN STATES PAVING CO., INC.,

Appellant,

v.

WASHINGTON STATE DEPT. OF TRANSPORTATION; DOUGLAS MACDONALD, Secretary of the Washington Dept. of Transportation; CITY OF VANCOUVER, Washington; CLARK COUNTY, Washington

Appellees.

And

UNITED STATES OF AMERICA;
UNITED STATES DEPT. OF TRANSPORTATION
and FEDERAL HIGHWAY ADMINISTRATION,

Intervenors – Appellees.

On Appeal from the United States Court for the Western District of Washington at Tacoma

CLARK COUNTY'S PETITION FOR PANEL REHEARING – FRAP 40

E. Bronson Potter
Senior Deputy Prosecuting Attorney
Clark County Prosecuting Attorney's Office
Civil Division
PO Box 5000
Vancouver, WA 98666-5000
(360) 397-2478

Counsel for Appellee Clark County

INTRODUCTION

On May 9, 2005, the Court filed an opinion reversing the trial court's granting of the defendants' motions for summary judgment. In the opinion of the counsel for the defendant Clark County, Washington, the opinion overlooked a material point of law raised in our appellee's brief. That point of law is that the plaintiff waived any claim that the trial court erred by granting Clark County's motion for summary judgment because the plaintiff did not address this issue in either its opening brief or reply brief. The failure to find that the plaintiff waived such claim of error would be contrary to numerous other decisions of the Court which are cited in this petition.

ARGUMENT

In this proceeding, Western States Paving Co. ("Western States") challenges the minority business enterprise program established in Washington pursuant to TEA-21. Western States seeks injunctive and declaratory relief, as well as damages. Each of the defendants brought a motion for a summary judgment. The County's motion for summary judgment requested the dismissal of Western States' damage claims against it based on the absence of any evidence that the County's inclusion of the MBE program goals was the result of animus or racial discrimination. The trial court granted summary judgment in favor of all of the defendants.

On appeal, Western States failed to raise any claim of error related to the dismissal of its damage claims against the County in either its opening or reply briefs. In its appellee's brief, the County argued that Western States waived any claim of error relating to the dismissal of its

damage claim against the County by not raising the alleged error in its brief.[1]

It is well established that the failure to address an issue in a party's opening brief will result in the waiver of any claim of error related to that issue. *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 (9th Cir., 1996); *Retlaw Broadcasting Co. v. NLRV*, 53 F.3d 1002, 1005 (9th Cir., 1995); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir., 1992); *Williams v. United States Gen. Serv. Admin.*, 905 F.2d 308, 312 (9th Cir., 1990); and *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir., 1986).

The Court's opinion filed May 9, 2005, fails to address the County's argument that Western States waived any claim that the district court erred by dismissing its damage claim against the County by not raising that alleged error in its briefing. The County requests the Court to grant this petition for rehearing and to issue an order affirming the dismissal of Western States' damage claim against the County.

Respectfully submitted,

/s/ E. Bronson Potter

E. Bronson Potter,
WSBA #9102
Senior Deputy Prosecuting Attorney
Of Attorneys for Appellee
Clark County

---

[1] See page 1 of Clark County's *Appellee's Brief*.

CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 40-1

I certify that pursuant to Circuit Rule 40-1, the attached petition for panel rehearing is proportionately spaced, has a typeface style of Microsoft Word in 14 point CG Times font, and contains 443 words.

DATED this 9th day of June, 2005.

Respectfully submitted,

/s/ E. Bronson Potter
E. Bronson Potter,
WSBA #9102
Senior Deputy Prosecuting Attorney
Of Attorneys for Appellee
Clark County

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN STATES PAVING CO., INC., Plaintiff-Appellant, v. WASHINGTON STATE DEPT. OF TRANSPORTATION; CITY OF VANCOUVER, WASHINGTON; CLARK COUNTY, WASHINGTON; and DOUGLAS MACDONALD, Defendants-Appellees, And UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF TRANSPORTATION; and FEDERAL HIGHWAY ADMINISTRATION, Intervenors-Appellees.	No. 03-35783 CV 00-5204 RBL CERTIFICATE OF SERVICE

STATE OF WASHINGTON)
) ss.
County of Clark)

I, Thelma Kremer, declare as follows:

I am a citizen of the United States of America and over 18 years of age and I am competent to testify to the matters set forth herein. On this 10th day of June, 2005, I caused true and correct copies of the following:

1. Clark County's Petition for Panel Rehearing – FRAP 40; and

2. Certificate of Service;

to be delivered by U.S. mail, postage prepaid, to the attorneys-of-record in the above-entitled action at the following addresses:

Gary Lofland
Attorney at Law
9 North 11th Avenue
Yakima WA 98902

Steve Dietrich
Asst. Attorney General
Transportation & Public Construction Division
PO Box 40113
Olympia WA 98504-0113

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United States Dept. of Justice
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950 Pennsylvania Ave., NW, PHB 5016
Washington DC 20530

Alison Chinn
Vancouver City Attorney's Office
210 East 13th St
Vancouver WA 98660

I declare this under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10 day of June, 2005.

/s/ Thelma Kremer
Thelma Kremer

NO. 03-35783

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN STATES PAVING CO., INC.
Plaintiff-Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; Douglas MacDonald, Secretary of the Washington Department of Transportation; CITY OF VANCOUVER, Washington; CLARK COUNTY,
Defendants-Appellees,

and

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF TRANSPORTATION AND FEDERAL HIGHWAY ADMINISTRATION,
Intervenors-Appellees.

CITY OF VANCOUVER'S PETITION FOR REHEARING FRAP 40

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Attorney for City Defendant-Appellee
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Telephone: (360) 696-8251

I. INTRODUCTION

On May 9, 2005, this Court filed its opinion, which reversed the trial court's granting of the State, County, and City defendants' motions for summary judgment. In the opinion of counsel for defendant-appellee City of Vancouver, this Court's decision overlooked a material point of law and/or fact raised in the City's appellee brief.

1. The first point of law overlooked was that the plaintiff-appellant waived any claim that the trial court erred when it granted the City's motion for summary judgment because the plaintiff-appellant did not address this issue in either its opening brief or reply brief. The failure to find that the plaintiff-appellant waived such claim of error is in conflict with other decisions of this Court, and in conflict with this Court's decision in *this* case.

2. The second point of law and/or fact overlooked was that it was undisputed that there was no evidence of intentional racial discrimination on the part of the City, and that the record fairly supported this alternative ground for summary judgment dismissal. The failure to consider summary judgment dismissal on an alternative ground when the record fairly supported this alternative ground, with undisputed facts, is in conflict with other decisions of this Court.

II. ARGUMENT

A. Background.

In this case, plaintiff-appellant, Western States Paving Co., Inc. ("Western States"), challenged the constitutionality of the Transportation Equity Act for the 21st

Century (TEA-21), which authorized the use of race- and sex-based preferences in federally funded transportation contracts, on its face or as applied by the State of Washington. Western States sought a declaratory judgment holding TEA-21's minority preference program to be a violation of equal protection. Western States also sought damages under federal and Washington state law.

Each of the defendants brought a motion for summary judgment. The City's motion for summary judgment requested the dismissal of Western State's damage claims against it based upon the absence of any evidence that the City's inclusion of the disadvantaged business enterprise ("DBE") goals in its contract was the result of racial or gender based animus or intentional discrimination.

The trial court granted summary judgment in favor of all defendants. The trial court held that TEA-21's minority preference program was constitutional on its face and as applied. In addition, the trial court held that Western State's claims under Washington law were without merit.

B. Plaintiff-appellant waived any claim of error by the trial court for granting the City's motion for summary judgment.

Western States waived any claim of error by the trial court for granting the City's motion for summary judgment because Western States failed to address this issue in either its opening or responsive briefs. In its briefs, Western States omitted to raise any issue directed at the City of Vancouver. Western States failed to raise any claim of error related to the dismissal of its damage claims against the City of Vancouver.

In its opening brief, Western States challenged the trial court's granting of summary judgment dismissal of its cause of action and set forth four specific issues. These four issues were: 1) "Whether the *State* of Washington has a compelling interest to include race and sex based preference in its affirmative action program . . . ". (Emphasis added.) 2) "Whether the *federal* government has a compelling interest to requiring the *State* of Washington to include race and sex based preferences in that state's affirmative action plan . . . ". (Emphasis added.) 3) "Whether a *federal* program that requires each of the fifty states to independently develop and implement an affirmative action program for "disadvantaged business enterprises" in the highway construction industry is narrowly tailored, . . . ". (Emphasis added.) 4) "Whether the disadvantaged business enterprise program developed by the *state* of Washington is narrowly tailored if that program includes race and sex based preferences . . . ". (Emphasis added.)[1]

In its reply brief, Western States likewise failed to raise any claim of error against the City of Vancouver related to the dismissal of its damage claims against the City.

In the City's brief, the City argued that issues not raised in appellant Western State's opening brief are waived.[2] The law in this Circuit is that issues not raised in a party's opening brief are waived. *See Paracor Finance v. General Elec. Capital Corp.*, 96 F.3d 1151, 1168 (9th Cir. 1996). *See also Smith v. Marsh*, 194 F.3d 1045, 1052 (9th

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[1] *See* Brief of Appellant Western States, p. 1-2.

[2] *See* Brief of Appellee City of Vancouver, p. 2-3.

Cir. 1999) ("arguments not raised by a party in its opening brief are deemed waived."); *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1046 n.7 (9th Cir. 1999) ("Brookfield chose not to argue its trademark dilution claim or its state law causes of action in its opening brief. We accordingly deem those issues waived."); *Zukle v. Regents of University of California*, 166 F.3d 1041, 1045 n. 10 (9th Cir. 1999) ("Zukle did not raise her race, sex or sexual harassment claims in her opening brief; therefore she has waived any appeal from the district court's grant of summary judgment on these claims.") The Ninth Circuit Court of Appeals reviews only issues that are argued specifically and distinctly in a party's opening brief. The Court will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

This Court specifically recognized this point of law when it held in *this* case, "Because Western States did not renew its state law arguments on appeal, those issues are waived". *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983, No. 03-35783, 2005 U.S. App. LEXIS 8061 at *5, n. 2 (9th Cir. May 9, 2005).

This Court's opinion filed on May 9, 2005, failed to address the City's argument that Western States waived any claim that the trial court erred by dismissing its damage claim against the City, when Western States failed to allege that error in any of its briefing. The failure to find that the plaintiff-appellant waived such claim of error is in conflict with other decisions of this Court, and in conflict with this Court's decision in *this* case.

C. There was undisputed evidence which supported an alternative ground for summary judgment dismissal.

In addition to Western States not assigning any error to the trial court for the trial court's dismissal of Western State's damage claims against the City, Western States omitted to respond to one of the bases on which the City argued for summary judgment. The City argued to this Court that it was entitled to summary judgment on three bases.[3] The third basis for granting summary judgment to the City was that there was no evidence of racial or gender based animus or intentional discrimination by the City.[4] The City argued this third basis before the trial court. Western States failed to address this argument in either its opening brief or its reply brief.

This Court acknowledged the City's argument that the City felt it was entitled to summary judgment on Western State's damage claims because there was no evidence of intentional racial discrimination by the City.[5] This Court went on to state that "The district court did not reach this issue" in its granting of summary judgment in favor of the City.[6] This Court further acknowledged that it "may affirm summary judgment on an alternative ground to that given by the district court *if the record fairly supports the alternative ground*".[7] However, this Court decided that it "need

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[3] *Id.* at p. 16-43.

[4] *Id.* at p. 40-43.

[5] *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983, No. 03-35783, 2005 U.S. App. LEXIS 8061 at *49, n. 13 (9th Cir. May 9, 2005).

[6] *Id.*

[7] *Id.* (Emphasis added.); (Citation omitted.)

not decide whether it would be appropriate to do so [in this case]" and stated that it would be "necessary on remand for the district court to address the State's liability for damages".[8] This Court also remanded "Western State's damages claims against the City and the County to allow the district court to resolve all aspects of this issue in the first instance".[9]

The record fairly supports the alternative ground – the City's third basis for granting summary judgment. In support of its motion for summary judgment, appellee City of Vancouver produced an affidavit by its Procurement and Contracts Manager explaining why the mandatory DBE goals were placed on the City's projects at issue. She testified, via affidavit, that the City did not have its own DBE program or requirement related to the awarding of its contracts, and that the only reason DBE goals were utilized for the two City projects in question was that it was a requirement imposed by WSDOT as a condition of the distribution of the FHWA funding.[10] These facts were not disputed by Western States or any of the other parties. Therefore, there is an alternative ground, supported by undisputed facts, on which summary judgment dismissal should be affirmed for the City.

This Court may uphold a grant of summary judgment on ground different than that on which the trial court relied. *Pritikin v. Department of Energy*, 254 F.3d 791, 796 (9th Cir. 2001), *cert. denied*, 534 U.S. 1133, 122 S. Ct.

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[8] *Id.*

[9] *Id.*

[10] Affidavit of Elizabeth Gotelli in Support of the City of Vancouver's Motion for Summary Judgment, ¶7; ER 325.

1076, 151 L. Ed. 2d (2002) (Ninth Circuit may affirm district court's decision granting summary judgment "on any ground supported by the record"); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir. 1994). Not only "may" the Court affirm, it "must" in fact affirm. *Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980). "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Id.*, citing *Helvering v. Gowan*, 302 U.S. 238, 245, 58 S. Ct. 154, 158, 82 L. Ed. 224 (1937). The City argued this position in its opening brief.[11]

Western States failed to respond to the City's third basis for summary judgment dismissal.

This Court's failure to consider summary judgment dismissal on an alternative ground when the record fairly supported this alternative ground, with undisputed facts, is in conflict with other decisions of this Court. Therefore, it is the opinion of the counsel for the City that there were material points of law and/or fact that were overlooked in this decision and that there are apparent conflicts with other decisions of this Court.

III. CONCLUSION

Based upon the foregoing argument and authority, City appellee submits: (1) This Court's opinion dated May 9, 2005, fails to address the City's argument that appellant Western States waived any claim that the trial court erred by dismissing its damage claims against the City, when

[11] *See* Brief of Appellee City of Vancouver, p. 12-14, 16-17.

Western States did not raise that alleged error in either its opening or responsive briefs. This is in conflict with other decisions of this Court, and in conflict with this Court's decision in *this* case, and; (2) This Court's failure to consider summary judgment dismissal on an alternative ground when the record fairly supported this alternative ground, with undisputed facts, is in conflict with other decisions of this Court.

City appellee respectfully requests this Court grant this petition for rehearing and to issue an order affirming the dismissal of Western State's damage claim against the City of Vancouver.

Respectfully submitted,

/s/ Alison J. Chinn
Alison J. Chinn, WSBA#12602
Assistant City Attorney
Attorney for Appellee City
of Vancouver

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing is in compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

DATED this 16th day of June, 2005.

Respectfully submitted,

/s/ Alison J. Chinn
Alison J. Chinn, WSBA#12602
Assistant City Attorney
Attorney for Appellee City
of Vancouver

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WESTERN STATES PAVING CO. INC. Plaintiff-Appellant, v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; CITY OF VANCOUVER, WASHINGTON; CLARK COUNTY, WASHINGTON; and DOUGLAS MACDONALD, Defendants-Appellees, And UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF TRANSPORTATION; and FEDERAL HIGHWAY ADMINISTRATION, Intervenors-Appellees.	No. 03-35783 CV-00-5204 RBL AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
ss:)
County of Clark)

I, Michelle Allan, being first duly sworn, on oath, deposes and says: that I am over 18 years of age; that on June 16, 2005, I mailed the following:

1. Letter addressed to Cathy A. Catterson, Clerk, Office of the Clerk, U.S. Court of Appeals for the Ninth Circuit;

2. City of Vancouver's Petition for Panel Rehearing – FRAP 40; and

3. Affidavit of Mailing for items 1-2 above; upon the parties herein, by mailing true and correct copies with proper postage affixed thereto to:

Office of the Court
United States Court of Appeals for the Ninth Circuit
PO Box 193939
San Francisco, California 94119-3939
(1 original and 3 copies)

Gary Lofland
Attorney at Law
9 North 11th Avenue
Yakima, Washington 98902
(1 copy)

Steve Dietrich
Assistant Attorney General
Transportation & Public Construction Division
905 Plum Street Building 3
PO Box 40113
Olympia, Washington 98504-0113
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Lisa J. Stark, Esq.
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Lisa J. Stark, Esq.
U.S. Department of Justice Civil Rights Division
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(1 copy)

E. Bronson Potter
Chief Deputy Prosecutor
Civil Division
Clark County Prosecutor's Office PO Box 5000
Vancouver, Washington 98666-5000
(1 copy)

The foregoing being the last known Post Office address of the above named parties. I declare this under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of June, 2005.

/s/ Michelle Allan
MICHELLE ALLAN

SIGNED AND SWORN to before me this 16th day of June, 2005.

[SEAL] /s/ Amy Heath
Signature of Notary Public

Title: NOTARY PUBLIC
My Commission Expires: 4/25/06

NO. 03-35783

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN STATES PAVING CO INC,
Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; Douglas MacDonald, Secretary of the Washington Department of Transportation; CITY OF VANCOUVER, Washington; CLARK COUNTY,
Appellees,

and

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF TRANSPORTATION AND FEDERAL HIGHWAY ADMINISTRATION,
Intervenors-Appellees.

On Appeal from the United States Court for the Western District of Washington at Tacoma

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REPLY BRIEF OF APPELLANT

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Counsel for Appellant

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TABLE OF AUTHORITIES

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I CONGRESS CANNOT TRULY HAVE A COMPELLING INTEREST IN RE-ESTABLISHING RACE AND GENDER BASED PREFERENCES IN TEA-21 IF IT HAS NOT CONSIDERED, AND HAS NO KNOWLEDGE OF THE EFFECTIVENESS OF PREVIOUS PROGRAMS, AND HAS NOT IDENTIFIED A RESULT IT SEEKS TO ACHIEVE

Race and gender preferences have been used in each highway and transportation appropriate since 1982.[1] It is

[1] Surface Transportation Assistance Act of 1982 (STAA) Puc. L. No 97-424 §105(f), 96 Stat. 2100; 1986: Surface Transportation Assistance

(Continued on following page)

clear from reading the debates leading to the enactment of TEA-21(ER 100-149) that Congress did not consider, or have before it, any information about the effectiveness, achievements, or progress of the predecessor programs.

The USDOT has asserted (USDOT Brief, p. 15) and some courts have accepted[2], that Congress has a compelling interest in eliminating discrimination and its effects in government procurent and spending. However, Congress cannot determine if there is a continuing need for the program, and the race and gender based preferences it encourages, if it has not considered the effectiveness and progress made under the previous program. It does not appear that Congress had an end result in mind when it passed TEA-21. There is no identifiable benchmark. There is nothing by which success is measured. The implied purpose of the DBE program is eliminating discrimination or its effects in government procurment and spending. While that goal is laudable, if the courts are to give meaning to equal protection they must require more than a recitation of the language of previous decisions. The Supreme Court has found that racial classifications, including those used to remedy past discrimination, are so harmful that they are presumptively invalid and can be upheld only upon a showing of extraordinary justification. *Shaw v. Reno*, 509 US 630, 644 (1993) If that principle is to have meaning, the court must carefully scrutinize the

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Act (STAA) 96 Stat 2097; 1987: Surface Transportation and Uniform Relocation Assistant Act (STURAA) 101 Stat 145 §106(c); 1991: Intermodal Surface Transportation Efficiency Act (ISTEA) 105 Stat 1919 §1003(b)

[2] *Adarand v. Slater*, 228 F. 3d. 1147 (10th Cir, 2000); *Sherbrook Turf v. Minnesota DOT*, 345 F. 3d. 963 (8th Cir, 2003)

actions of Congress to ensure the "most exact connection between justification and classification." *Fullilove v. Klutznick*, 448 US 488, 537 (1980) and are "specifically and narrowly formed to accomplish that purpose." *Shaw*, 517 US at 908.

Congress cannot know where it needs to go if it does not know where it has been. A compelling interest is not demonstrated by a mere recitation of language of previous decisions. The lack of such evidence before Congress should preclude the finding there was a compelling interest.

II THE FAILURE OF THE DISTRICT COURT TO SET FORTH FINDINGS AS TO THE SCOPE AND CONTENT OF THE EVIDENCE BEFORE CONGRESS REQUIRES REVERSAL

Under *Croson*, in order to determine whether a racial classification is constitutional, a reviewing court must be satisfied that "a strong basis in evidence" supports the legislature's conclusion that discrimination persisted and remedial action was needed. *City of Richmond v. Croson*, 488 US 469, 500 (1989). For the court to undertake meaningful appellate review, it is essential that the District Court set forth detailed findings as to the scope and content of the reports before Congress when it enacted the challenged legislation, and set forth whatever inferences may be drawn as to whether such reports could constitute a "strong basis in evidence" for remedial action. *Croson*, 488 US at 510; *Rothe Development Corp v. Dept of Defense*, 263 F. 3d. 1306, 1323 (Fed Cir, 2001)

In the case below, the court did not identify reports or evidence it considered, not did it make detailed findings as

to the scope and contend of any report before Congress when it enacted TEA-21. Instead, the court merely stated "everything submitted by the parties has been read and reviewed in detail" and made the conclusory statement that it has undertaken a "detailed skeptical non-deferential analysis" concluding that Congress had a compelling interest. (ER 26)

Instead of conducting the required analysis, the court below deferred to Congress and the 10th Circuit Adarand decision. (ER 27) The failure of the court below to conduct a detailed independent analysis requires reversal. *Rothe*, 262 F. 3d. at 1325. The trial court should make "proper findings" which define both the "scope of the injury and the extent of the remedy necessary to cure its effects." *Croson*, 488 US at 510.

III TEA-21 AND THE IMPLEMENTING REGULATIONS ONLY PERMIT THE USE OF RACE AND GENDER BASED PREFERENCES IN THOSE JURISDICTIONS IN WHICH DISCRIMINATION OR ITS LINGERING EFFECTS ARE ACTUALLY FOUND

The USDOT and FHWA acknowledged that the use of race and gender based preferences are:

> limited to **only** those jurisdictions where discrimination or its effects are a problem and **only** as a last resort when race neutral relief is insufficient
>
> USDOT Brief, p. 28
> [Emphasis Added]

The USDOT also asserts:

> because the regulation requires a recipient to determine whether and to what extend discrimination or its lingering effects actually exist within its jurisdiction and permit the use of race-conscious contracting preferences only when race neutral measures are insufficient, they help ensure the States and other recipients implement individual DBE programs in compliance with constitutional requirements.
>
> USDOT Brief, p. 29

See also: USDOT Brief, p. 7, 11, 14, 24, and 25.

Thus, the Department of Transportation acknowledges that its regulations and the DBE program has changed significantly and substantially from the predecessor programs. The programs established under previous enactments required that a specified percentage of the funds had to be set aside for DBEs. *Milwaukee Pavers v. Fielder*, 922 F. 2d. 419, 442 (7th Cir, 1991) The USDOT program implemented under TEA-21 requires the recipient to carefully analyze the local market to determine if discrimination and its lingering effects actually exist, and then implement race and gender preferences only as a last resort.

The USDOT has misconstrued Western States argument. Western States has argued that Congress could not have established a uniform national program that required race and gender preferences uniformly even in jurisdiction where discrimination did not exist or persist. The USDOT has agreed that Congress did not and could not do so. (USDOT Brief, p. 24) The USDOT has agreed that "the statutory and regulatory provisions only authorize, and do

not require, the use of race [gender] conscious remedies in any particular jurisdiction unless discrimination or its effect are actually present . . . " (WSDOT Brief, p. 24) That is the only interpretation of TEA-21 and the regulations that will meet constitutional scrutiny.

IV THE STATE DBE PROGRAM IS UNCONSTITUTIONAL BECAUSE IT IMPOSES MANDATORY RACE AND GENDER BASED PREFERENCES ALTHOUGH THE STATE CANNOT IDENTIFY ANY PAST DISCRIMINATION OR LINGERING EFFECTS

The State of Washington Department of Transportation has misconstrued and misapplied the DBE program under TEA-21. Although the federal program ostensibly assists "socially and economically" disadvantaged businesses. (USDOT Brief, p. 5-6) The WSDOT does not even attempt a pretense that the DBE program supports the socially and economically disadvantaged, instead it states that the purpose is "to provide equal opportunity to minorities and women in contracting." (ER 337)

The WSDOT program, however, provides far more then equal opportunity to minorities and women. It creates mandatory preferences and conditions the award of individual contracts upon meeting the mandatory goal imposed. The State does this despite having no disparity study, and admitting the State is not aware of any discrimination that has occurred against any protected class in WSDOT administrated contracts (ER 208-211). The State also admits that it not aware of any discrimination against DBE, minorities, or female contractors by lenders or sureties. (ER 212)

The required use race and sex based preferences is in contradiction to the federal program which requires the recipient to determine that discrimination or its lingering effects actually exists before a preferences are used, and then such preferences can be used only as a last resort.

The State program cannot be saved by a claim that the State is merely implementing a federal program and is therefore only an agent of the federal government. (WSDOT Brief, p. 17) The TEA-21 regulation places the responsibility of crafting a narrowly tailored plan on the State. The WSDOT does not monitor or second guess the State's ultimate authority to determine if discrimination has occurred and if preferences are necessary. That is clearly the State's role. No goals are mandated under the federal regulations. (USDOT Brief, p. 9) Clearly "if a State exceeded its federal authority it would be vulnerable to a challenge under Croson." *Milwaukee Pavers*, 922 F. 2d. at 424. The State has clearly exceeded its authority by using race and gender based preferences when there is no evidence of discrimination or its lingering effects actually exist.

The State argues the goal is tied to the local market conditions, and the availability of ready, willing, and able DBEs in the local market. (WSDOT Brief, p. 29) The WSDOT has determined a numerical goal based upon availability of DBEs locally. The State, however, forgets that a goal under the federal program is merely "aspirational," and that no particular goal or result is required. 49 CFR 26.41(B) In the rush to achieve what is only an aspirational goal, the State has mandated contractual goals, requiring as a "condition of award," that the goal be met and restricting the award of a contract to those who meet the mandatory goal. (ER 276, 281, 285, 293, 295,

326) The State has emphasized to contractors that the goal is "mandatory." (ER 327) The State has done so despite there being no evidence that discrimination or its lingering effects actually exists.

The State lacks valid statistical evidence. The State appears to rely upon the yearly estimate of those minority and women owned firms available to perform the work. Such evidence is not valid or sufficient. For statistical evidence to create an inference of discrimination the statistics must show a significant disparity and eliminate non-discriminatory explanations for the disparate between comparable individuals. *Fallis v. Kerr McGee Corp*, 944 F. 2d. 743 (10th Cir, 1991); *Wessman v. Glistens*, 160 F. 3d. 790 (1st Cir, 1998). The State "statistics" do not show causation. Without proof discrimination or its lingering effects actually exists, the State may not impose preferences.

V NEITHER THE STATE NOR THE FEDERAL GOVERNMENT COULD IMPOSE A RACE AND GENDER BASED PREFERENCE PROGRAM IN WASHINGTON

It bears repeating. Neither the State nor the federal government could impose a race and gender based preference program in a highway and transportation program in Washington. This court has clearly found that "any program adopted without some legitimate evidence of discrimination is presumptively invalid." *Coral Const. Co v. King County*, 941 F. 2d. 910, 920 (9th Cir, 1991); *Monterey Mechanical*, 125 F. 3d. at 713. The State of Washington admittedly has no such evidence.

The federal government has acknowledged that it could not implement a direct procurement program in Washington utilizing racial preferences. *Adarand*, 534 US at 111 n2.

The federal government concedes it could not impose preferences. In Federal programs, the federal government acknowledges the State cannot impose preference without proof discrimination or its lingering effects actually exist in the local market. The State has been unable to explain how it can implement a program requiring race and gender preferences under TEA-21 when it could not do so alone. The simple answer is that it cannot do so.

VI CONCLUSION

The court should reverse the decision of the District Court and find that the DBE program established by the State is unconstitutional as applied. The program imposes race and gender based preferences in the absence of proof of discrimination.

The decision of the District Court finding Congress has a compelling interest in enacting TEA-21 should be reversed and remanded for the detailed inquiry established in Rothe Development.

DATED this 6 day of May, 2004.

/s/ Gary E. Lofland
Gary E. Lofland WSBA# 12150
Attorney for Western States
Paving Co Inc

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32

I, Ginger M. Hansen, declare that:

I prepared this brief using Corel Wordperfect 8.0 for Lofland and Associates, Gary E. Lofland. I certify that I made a good faith effort to comply with FRAP 32 and Circuit Rule 32. I used a propotional, 14 point New Times Roman font. I set the top and bottom margins at 1 inch. I set the side margins at 1 inch. I used the Word Count tool to determine that the main body of this brief has about 2,151 words.

I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 6 day of May, 2004.

/s/ Ginger Hansen
Ginger M. Hansen
Lofland and Associates

NO. 03-35783

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN STATES PAVING CO., INC.,

Appellant,

v.

WASHINGTON STATE DEPT. OF TRANSPORTATION; DOUGLAS MACDONALD, Secretary of the Washington Dept. of Transportation; CITY OF VANCOUVER, Washington; CLARK COUNTY, Washington

Appellees.

And

UNITED STATES OF AMERICA; UNITED STATES DEPT. OF TRANSPORTATION and FEDERAL HIGHWAY ADMINISTRATION,

Intervenors – Appellees.

On Appeal from the United States Court for the Western District of Washington at Tacoma

BRIEF OF APPELLEE CLARK COUNTY, WASHINGTON

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I. STATEMENT OF JURISDICTION

Clark County agrees with the statement of jurisdiction set forth in the appellee's brief of the City of Vancouver and incorporates that statement herein by this reference.

II. STATEMENT OF THE ISSUES

In addition to the issues set forth in the appellant's brief, this appeal presents the following issues.

1. Whether Western States Paving Co. ("Western States") waived any claim of error related to the granting of summary judgment in favor of Clark County by not raising that alleged error in its opening brief.

2. If the issue wasn't waived, whether the district court erred in granting Clark County summary judgment given the absence of any evidence that the county's inclusion of Washington State Department of Transportation's ("WSDOT") Disadvantaged Business Enterprise ("DBE") program goals in a public works contract was the result of racial or gender based animus or intentional discrimination.

III. STATEMENT OF THE CASE

Clark County accepts the statement of the case set forth in the Western States' opening brief, but would add the following with respect to the nature of the claims, the course of proceedings, and disposition of the claims against Clark County.

In its amended complaint, Western States Paving sought a declaratory judgment that the Transportation Equity Act for the 21st Century ("TEA-21") is unconstitutional; a declaratory judgment that WSDOT's DBE program is unconstitutional; and monetary damages against Clark County.[1] Clark County filed a motion for summary

[1] Amended Complaint, DT 31, ER 35.

judgment seeking the dismissal of Western States' claims for damages against it on the basis that there is no evidence to support a conclusion that Clark County's inclusion of WSDOT's DBE goals in its contract was the result of racial or gender based animus or intentional discrimination.[2] In its order granting summary judgment, the district court specifically granted Clark County's motion.[3]

IV. STATEMENT OF FACTS

In 2000, Clark County issued a Request for Proposals ("RFP") for a county road project known as the "Padden Parkway (East Leg)." This project involved the construction of two miles of a four-lane county road and median. The project was substantially paid for with funds from the Federal Highway Administration ("FHWA").[4]

In Washington, the distribution of FHWA funding is administered by WSDOT.[5] In connection with the Padden Parkway (East Leg) project, WSDOT issued a letter addressed to Clark County imposing a "14% mandatory DBE goal for this project."[6] As stated in the amended complaint, "the DBE requirements implemented by WSDOT must be followed and enforced by the local government to which funds are distributed."[7] Western States' damage claim against the county is based upon the county

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[2] County's Motion for Summary Judgment, DT 97, Suppl. ER 8.

[3] Order Granting Summary Judgment, DT 148, ER 16-33 at page 33.

[4] See Declaration of Pete Capell, DT 98, Suppl. ER 11.

[5] *Ibid.*

[6] *Ibid.*

[7] See paragraph 10 of the Amended Complaint, DT 31, ER 37.

including this 14% DBE goal in its contract for the Padden Parkway (East Leg) road project.[8]

Western States did not submit a bid to the county on the Padden Parkway (East Leg) project. Rather, it was a subcontractor who dealt with the general contractor, not the county, in seeking a subcontract on the project.[9] Clark County did not have any interaction with Western states on the Padden Parkway (East Leg) project.

Clark County does not have a DBE program or affirmative action program of its own that is related to the awarding of public contracts.[10] The only reason the DBE goal was utilized in the Padden Parkway (East Leg) contract is that it was a requirement imposed by WSDOT as a condition of the distribution of the FHWA funding.[11]

V. SUMMARY OF ARGUMENT

TEA-21 and WSDOT's DBE program are constitutional for the reasons set forth in the briefs of the federal, state and city appellees. The court properly dismissed the amended complaint.

Western States chose not to argue, in its opening brief, that the granting of the county's motion for summary judgment was erroneous. Therefore, Western States has waived any right to appeal the granting of the county's motion for summary judgment. If the issue hasn't been

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[8] See Amended Complaint, DT 31, ER 37-38.

[9] See paragraph 21 of the Amended Complaint, DT 31 at ER 38 and letter from general contractor to Western States at ER 300.

[10] *Ibid.*

[11] *Ibid.*

waived, the county was also entitled to summary judgment dismissing Western States' damage claims against the county because there is no evidence to support a conclusion that the county's inclusion of WSDOT's DBE goals in its contract was the result of racial or gender based animus or intentional discrimination.

VI. ARGUMENT

A. Waiver of Claim of Error.

1. *Standard of Review.*

In assessing whether an issue is sufficiently argued to avoid waiver, the court looks to whether the opening brief contains the appellant's contentions, as well as citations to authorities and the record to support those contentions. Fed. R. App. P. 28(a)(9)(A).

2. *Argument.*

Clark County filed a separate motion for summary judgment seeking the dismissal of Western States' damage claims against the county.[12] The basis of the motion was that, separate from the constitutionality of TEA-21 or the state DBE program, the plaintiff could not prevail on a claim for damages absent evidence of racial or gender based animus or intentional discrimination.[13] While the analysis in the order granting summary judgment addresses the constitutionality of TEA-21 and the state DBE

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[12] Clark County Motion for Summary Judgment, DT 97, Suppl. ER 8.

[13] *Ibid.*

program, the order also specifically granted the county's motion for summary judgment.[14]

Western State's opening brief does not contain any discussion of the district court's granting the county's motion for summary judgment. In *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 (9th Cir. 1996), the appellant argued in a footnote of its opening brief that the district court erred in retroactively applying the Torture Victim Protection Act. The court refused to consider this argument, stating, "The summary mentioned of an issue in a footnote, without reasoning in support of the appellant's argument, is insufficient to raise the issue on appeal." *Citing*, *Retlaw Broadcasting Co. v. NLRB*, 53 F.3d 1002, 1005 n. 1 (9th Cir. 1995); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992); *International Olympic Committee v. San Francisco Arts and Athletics*, 781 F.2d 733, 738 n. 1 (9th Cir. 1986). In *Retlaw Broadcasting Co. v. NLRB*, *supra*, at 1005, the court declined to address an issue which was "summarily mentioned" in the opening brief, but had not been "fully briefed."

With respect to the granting of the county's motion for summary judgment, Western States' opening brief not only fails to include arguments and citations to authorities in support of a claim that the district court erred, it fails to mention the issue at all. Clearly, Western States has waived any argument that the district court erred by granting the county's motion for summary judgment and the dismissal of the damage claims against the county should be affirmed.

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[14] Order Granting Summary Judgment, DT 148, ER 16-33, at page 33.

B. Summary Judgment was Properly Granted.

1. *Standard of Review.*

A review of the district court's grant of summary judgment is conducted de novo. *Moran v. State of Washington*, 147 F.3d 839, 844 (9th Cir. 1998). Summary judgment must be granted against a party who fails to make a showing sufficient to establish the existence of an essential element to the party's case. *Celotex v. Catrett*, 47 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). On appeal, the court limits its review to the record presented to the district court. *Harkins Amusement Enterprises, Inc., v. General Cinema Corp.*, 850 Wn.2d 477, 482 (9th Cir. 1988). The court must uphold a grant of summary judgment even if it is on a ground different than that relied upon by the district court if the ground is supported by the record. *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 158, 82 L.Ed. 224 (1937) and *Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rico*, 614 F.2d 1247, 1256 (9th Cir. 1980).

2. *Argument.*

(a) Summary.

The district court properly granted summary judgment in favor of the county dismissing Western States Title VI, 42 USC §1981 and §1983 damage claims because there was no evidence of racial or gender based animus or intentional discrimination. The district court also properly granted summary judgment in favor of all of the defendants because TEA-21 and WSDOT's DBE program are constitutional.

(b) Title VI Claim (42 USC §2000d).

The Supreme Court established in *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582, 584, 77 L.Ed.2nd 866, 103 S.Ct. 3221 (1983), and more recently in *Alexander v. Sandoval*, 532 U.S. 275, 280, 121 S.Ct. 1511, 149 L.Ed. 2d 517 (2001), that plaintiffs cannot recover compensatory damages under Title VI unless they prove intentional discrimination. In fact, in *Alexander v. Sandoval*, 532 U.S. at 280, the Supreme Court stated this requirement is "beyond dispute."

Justice White concluded, in *Guardians*, that while a plaintiff may be entitled to declaratory or injunctive relief under 42 U.S.C. §2000d absent a showing of discriminatory animus, compensatory damages are not available. He stated:

> The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI of the Civil Rights Act of 1964, 78 stat. 252, as amended, 42 U.S.C. §2000(d), *et. seq.*, and administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent. However, I conclude that judgment below should be affirmed on other grounds, because, in the absence of proof of discriminatory animus, compensatory relief should not be awarded to private Title VI plaintiffs; unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations.

Guardians at 584.

The Ninth Circuit examined the intentional discrimination requirement of Title VI in *Ferguson v. City of Phoenix*, 157 F.3d. 669 (9th Cir. 1998). In determining that proof of intentional discrimination was required, the court reviewed *Guardians* stating:

> *Guardians* is comprised of a number of concurrences and dissents, but that does not mean it is not useful. From *Guardians* comes the majority message that in the absence of proof of discriminatory animus, compensatory relief should not be allowed under Title VI.

Ferguson at 674. The court, in *Ferguson*, noted, as did Justice White in *Guardians*, that a plaintiff may be entitled to "corrective remedies . . . regardless of intent", but compensatory damages were only to be awarded for intentional discrimination. *Ferguson* at 674-675. From the foregoing, it is "beyond dispute" that intentional discrimination is an essential element of a claim for damages under Title VI.

(c) 42 U.S.C. §1981 and 42 U.S.C. §1983 Claims.

Proof of discriminatory intent is also required to recover damages under either 42 U.S.C. §1981 or 42 U.S.C. §1983. In *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 2nd 597 (1976), the Supreme Court held that claims of racial discrimination brought under 42 U.S.C. §1981 cannot rest solely on racially disproportionate impact, but rather, must be premised upon proof of a discriminatory motive or purpose. *See also, General Building Contractors v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed. 2d. 835 (1982). This requirement was also recognized in the Ninth Circuit in *Officers for Justice*

v. Civil Service Commission of San Francisco, 688 F.2d 615 (1982).

In *Personal Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed. 2nd 870 (1979), the Supreme Court held that proof of intentional discrimination is a requirement to recover for alleged equal protection violations under 42 U.S.C. §1983. As the Court explained:

> Discriminatory purpose, "however implies more than intent as volition or intent as awareness of consequences". *See, United Jewish Organizations v. Carey*, 430 U.S. 144, 179 (concurring opinion). It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," and not merely "in spite of," its adverse effects upon the identifiable group. Yet nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping woman in a stereotypic and predefined place in Massachusetts Civil Service.

Feeney at 278. Similarly, nothing in the present record demonstrates that the county intentionally discriminated against Western States.

The requirement proving discriminatory intent in order to recover damages under 42 U.S.C. §1983 was recognized by the Ninth Circuit in *Chavez v. Tempe Union High School Dist.*, 565 F.2d 1087 (9th Cir. 1977). In that case, the court stated:

> Because Section 1983 incorporates by reference the terms of the Constitution itself, it appears

> that an action under this statute, at least to the extent that it relies upon the Equal Protection Clause of the Fourteenth Amendment, requires proof not only of discriminatory impact, but also of discriminatory intent as established by the Supreme Court in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 597 (1976)."

Chavez at 1095.

To prove intentional discrimination, one must show that "a challenged action was motivated by an intent to discriminate." *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1406 (11th Cir. 1993). This requires proof that the defendant was not only aware of the plaintiff's race, but also acted, at least in part, because of the plaintiff's race. *Elston* at 1406. As stated in *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996):

> In order to establish liability under Section 1983, Nabozny must show that the defendants acted with a nefarious discriminatory purpose *(citing Feeney, 442 U.S. at 279)* and discriminated against him based upon his membership in a definable class. *(Internal citizens omitted)* As we explained in *Shango v. Jurich*, 681 F.2d 1091 (7th Cir. 1982):
>
> The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action. A plaintiff must demonstrate intentional or purposeful discrimination to show an equal protection violation. Discriminatory purpose, however implies more than intent as volition or intent as awareness of consequences. It implied that a decision maker signaled out a particular group for disparate treatment and his selected

> course of action at least in part for the purpose of causing its adverse effects upon the identifiable group.

Nabozny at 453-454.

From the foregoing, it is clear that intentional discrimination is an essential element of a claim for damages under Title VI.

(d) Western States Failed to Prove Intentional Discrimination.

In order to avoid summary judgment on its damage claims against the county, the burden was on Western States to produce evidence sufficient to establish the existence of every element essential to its case. *Celotex, supra.*

The district court properly dismissed Western States' Title VI, 42 U.S.C. §1981, and 42 U.S.C. §1983 damage claims against the county because there was no evidence that the county intentionally discriminated against Western States. In this regard, it should be remembered that Western States did not submit a bid to the county to work on the Padden Parkway (East Leg) project. Rather, it was a subcontractor who was rejected by the general contractor.[15] There is no evidence that the county ever interacted with Western States, let alone intentionally discriminated against it.

The county does not have a DBE policy of its own. Rather, the DBE goal was included in the contract signed

[15] See paragraph 21 of the Amended Complaint, DT 31 at ER 38 and general contractor's letter to Western Sates at ER 300.

by the general contractor as required by WSDOT. The county included the DBE goal in the contract with the general contractor because it was a WSDOT requirement; not because the county was motivated by a discriminatory purpose. Western States failed to produce any evidence of intentional discrimination, let alone sufficient evidence to establish this essential element of its damage claims.

The Supreme Court in *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74, 117 L.ed.2d 208, 112 S.Ct. 1028 (1992), stated, "The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." In this same vein, the Supreme Court in *Guardians*, 463 U.S. at 598, explained that monetary recovery under Title VI requires proof of intent so that the court can be sure the recipient of Title VI funds had knowledge of the violation and could have chosen to refuse the federal funds, rather than face liability.

The district court properly granted the county's motion for summary judgment.

(e) TEA-21 and WSDOT's DBE Program are Constitutional.

The City of Vancouver included, in its appellee's brief, an analysis of why TEA-21 and its regulations are constitutional on their face and as applied through the WSDOT DBE Program. It is anticipated that the federal and state defendants will be providing additional constitutional analysis. As provided for in Fed. R. App. P. R. 28(i), the county adopts and joins in those arguments by this reference.

VII. CONCLUSION

The Court should affirm the grant of summary judgment in the county's favor for several reasons. First, TEA-21 and WSDOT's DBE program are constitutional. Thus, the inclusion of the DBE goal in the county's contract was lawful and not actionable. Second, Western States failed to make any claim of error specific to the granting of the county's motion for summary judgment. Therefore, Western States waived any argument that the granting of the county's motion for summary judgment was in error. Third, even if Western States was allowed to challenge the granting of the County's motion for summary judgment, there is no evidence in the record that the inclusion in the county's contract of the DBE goal was the result of racial or gender based animus or intentional discrimination. Absent that evidence, the county was entitled to summary judgment. For the foregoing reasons, the Court should affirm the dismissal of Western States' claims against the county.

VIII. STATEMENT OF RELATED CASES

The county does not have knowledge of any related cases pending in this Court.

IX. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of FED. R. App. P. 32(a)(7)(B) because this brief contains 15,820 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point CG Times font.

DATED this the 8th day of March, 2003.

Respectfully submitted,

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NO. 03-35783

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN STATES PAVING CO., INC.,

Plaintiff-Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; Douglas MacDonald, Secretary of the Washington Department of Transportation; CITY OF VANCOUVER, Washington; CLARK COUNTY,

Defendants-Appellees,

and

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF TRANSPORTATION AND FEDERAL HIGHWAY ADMINISTRATION,

Intervenors-Appellees.

APPEAL FROM THE UNITED STATES COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT TACOMA

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I. STATEMENT OF JURISDICTION

A. Jurisdiction of the District Court

The district court has personal and subject matter jurisdiction over appellant's civil rights claims under Title 42, United States Code, § 1983, and Title 28, United States Code, §§1331, 1343, and 2201. The district court has pendent jurisdiction over appellant's state law claims pursuant to Title 28, United States Code, § 1367.

B. Jurisdiction of the Court of Appeals

This Court has jurisdiction to review the district court's order granting all of appellees' motions for summary judgment and the judgment in a civil case, pursuant to Title 28, United States Code § 1291.

C. Timeliness of the Appeal

The district court's order granting appellees' motions for summary judgment was entered on September 3, 2003.[1] The district court's judgment was entered on September 8, 2003.[2] Appellant's notice of appeal was filed on September 22, 2003.[3] The appeal is timely. *See* Rule 4(a)(1)(A), Federal Rules of Appellate Procedure.

D. Appealability of the Order and Judgment

The order granting appellees' motions for summary judgment and the judgment in a civil case are appealable

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[1] Order, Docket Text ("DT") 148; Excerpts of Record ("ER") 16-33.

[2] Judgment in a Civil Case, DT 150; ER 34.

[3] Notice of Appeal, DT 152; ER 1-2.

because they are final decisions of the district court. Title 28, United States Code, § 1291.

II. STATEMENT OF THE ISSUES

Appellant Western States has limited its appeal to several of the issues it raised at the trial court level. The law of this circuit is that issues not raised in a party's opening brief are waived. *See Paracor Finance v. General Elec. Capital Corp.*, 96 F.3d 1151, 1168 (9th Cir. 1996). *See also Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("arguments not raised by a party in its opening brief are deemed waived."); *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1046 n.7 (9th Cir. 1999) ("Brookfield chose not to argue its trademark dilution claim or its state law causes of action in its opening brief. We accordingly deem those issues waived."); *Zukle v. Regents of University of California*, 166 F.3d 1041, 1045 n. 10 (9th Cir. 1999) ("Zukle did not raise her race, sex or sexual harassment claims in her opening brief; therefore she has waived any appeal from the district court's grant of summary judgment on these claims.") The Ninth Circuit Court of Appeals reviews only issues that are argued specifically and distinctly in a party's opening brief. The Court will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

A. Restatement of the Issues

1. Whether the Transportation Equity Act for the 21st Century ("TEA-21"), Pub. L. 105-178, 112 Stat. 107 (1998) and its regulations (49 C.F.R. Part 26) were constitutional on its face.

2. Whether the Washington State Department of Transportation ("WSDOT") Disadvantaged Business Enterprise ("DBE") program was constitutional as applied when it complied with TEA-21 and its regulations.

III. STATEMENT OF THE CASE

Appellee City of Vancouver accepts the Statement of the Case by appellant, but would add the following regarding the nature of the case.

Appellant Western States Paving challenges the constitutionality of TEA-21 and the actions of appellees WSDOT, the City of Vancouver, and Clark County while awarding three public works contracts. Appellant is an asphalt and paving contractor.[4] Appellant alleged that it was denied subcontracting work on three federally funded highway projects because TEA-21, as administered by WSDOT, Vancouver, and Clark County, required a specified percentage of the total contract be awarded to a DBE.[5] Appellant alleged the DBE utilization goal on the contracts imposed the use of race and gender as factors in the award and performance of the contracts in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[6] Appellant also alleged the actions of appellees violated provisions of the Washington State Civil Rights Act codified at RCW 49.60.400[7], (formerly known as

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[4] Complaint ¶ 1, DT 31; ER 35.

[5] Complaint ¶¶ 8 – 22, DT 31; ER 36-38.

[6] Complaint ¶ 30, DT 31; ER 38-39.

[7] Complaint ¶ 23, Third Claim, DT 31; ER 39. Appellant's opening brief fails to argue this claim, and therefore, City appellee will not address this.

Initiative Measure No. 200), and federal civil rights statutes – 42 U.S.C. § 1981, 42 U.S.C. § 1983, and 42 U.S.C. §2000(d)[8].

Western States Paving sought various remedies. It requested declaratory judgment invalidating race and sex based preferences used in the award of public work contracts[9], injunctive relief[10], monetary damages[11], and attorney's fees and costs[12].

IV. ADDITIONAL FACTS

In March 1999, appellee City of Vancouver, Washington ("City") sought bids for a project that was titled "Mill Plain Boulevard Extension – Urban Improvement segment from Lincoln Avenue to Columbia Street (TA-0653)", hereinafter "Mill Plain Project".[13] The Mill Plain Project involved the construction of 2.11 miles of a four-lane city road.[14] This project was substantially funded by Federal Highway Administration (FHWA) funds.[15]

In July 2000, appellee City sought bids for a project that was titled "Street Widening and Realignment NE 25th Street/NE Burton Road Andresen Road to NE 86th

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[8] Complaint ¶ 22, Second Claim, DT 31; ER 39.

[9] Complaint ¶ 30, DT 31; ER 38-39.

[10] Complaint ¶ 25, DT 31; ER 39.

[11] Complaint ¶ 22 and 24, DT 31; ER 39.

[12] Complaint ¶Prayer for Relief, DT 31; ER 40.

[13] Affidavit of Elizabeth Gotelli in Support of the City of Vancouver's Motion for Summary Judgment, ¶3, DT 102; ER 324.

[14] *Id.*

[15] *Id.*

Avenue and N. Burton road/NE 18th Street (TA-0443)", hereinafter "NE Burton Road Project".[16] The NE Burton Road Project involved the construction of .75 miles of a city road.[17] This project was also substantially funded by FHWA funds.[18]

Appellant Western States sought to perform subcontracts on the Mill Plain Project and the NE Burton Road Project.[19]

In Washington State, the distribution of FHWA funding is distributed and administered by the Washington State Department of Transportation (WSDOT).[20] In connection with the Mill Plain Project, WSDOT issued a letter to the City imposing a 16% DBE goal.[21] In connection with the NE Burton Road Project, WSDOT issued a letter to the City imposing a 14% DBE goal.[22]

The City does not have its own Disadvantaged Business Enterprise program or requirement related to the awarding of its contracts.[23] The only reason DBE goals were utilized in the Mill Plain Project and the NE Burton Road Project is that it was a requirement imposed by

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[16] *Id.* at ¶5.

[17] *Id.*

[18] *Id.*

[19] Complaint, ¶¶13 and 17, DT 31; ER 37.

[20] Affidavit of Elizabeth Gotelli in Support of the City of Vancouver's Motion for Summary Judgment, ¶4, DT 102; ER 324.

[21] *Id. See,* Exhibit A; ER 326.

[22] *Id.* at ¶6; ER 325. *See,* Exhibit B; ER 327.

[23] *Id.* at ¶7; ER 325.

WSDOT as a condition of the distribution of the FHWA funding.[24]

Prior to Congress enacting TEA-21, there were extensive congressional hearings and investigations and reports showing there were discriminatory barriers, which put minority and women-owned businesses at a competitive disadvantage in the marketplace.[25]

On February 2, 1999, the United States Department of Transportation ("USDOT") issued a final rule establishing a DBE program regulation under the authority of TEA-21.[26] As required by USDOT's regulation, recipients of certain categories of Federal transportation funding must submit to the concerned USDOT operating administration, for its review and approval, a DBE program conforming to the UDSOT's DBE regulation.[27] In this case, the concerned operating administration was the Federal Highway Administration ("FHWA").[28]

WSDOT developed its DBE Program and submitted it to FHWA for review and approval. FHWA reviewed and

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[24] *Id.* at ¶7; ER 325.

[25] *See*, Senate debates over the DBE provisions of TEA-21 on March 5 and 6 and May 22, 1998, and House debates over the DBE provisions of TEA-21 on April 1 and May 22, 1998, submitted by Federal defendants-appellees in support of their motion for summary judgment, Exhibits 4 and 5 to Declaration of Charles E. Leggott, DT 100; ER 56-128 and ER 129-149.

[26] Declaration of Robert C. Ashby Concerning the United States Department of Transportation's Approval of Washington's Disadvantaged Business Enterprise Program Plan and Fiscal Year 2000 Goal, Exhibit 7 to Declaration of Charles E. Leggott, page 2, DT 100; ER 170.

[27] *Id.*

[28] *Id.*

approved WSDOT's current DBE plan in 2000 and approved WSDOT's previous DBE plan in 1999.[28]

The Washington State Secretary of Transportation adopted a plan implementing a DBE Program for the State of Washington by Executive Order dated July 26, 1999.[30] This Executive Order was issued to assist WSDOT employees with implementing the DBE Program.[31] One of the purposes of the plan was to "provide assurances to the U.S. Department of Transportation (USDOT) that WSDOT and its subrecipients of federal financial assistance will comply with federal mandates regarding the DBE Program."[32]

USDOT and/or FHWA approved the current Washington DBE Program on April 5, 2000 based on the Program's compliance and consistency with the USDOT's/FHWA's DBE regulations.[33] Washington State's DBE Program closely follows a "Sample DBE Program" developed by USDOT and which was provided to the states as an example of a legally sufficient DBE program under the regulation.[34] The USDOT DBE regulation provides that

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[28] Declaration of Brenda Richardson in Support of State Defendant's Motion for Summary Judgment, ¶3, DT 104; ER 316.

[30] Disadvantaged Business Enterprise Program: Participation Plan (WSDOT, February 2000), Exhibit 4 to Sworn Statement of Gary E. Lofland, DT 118; ER 329-421.

[31] *Id.*; ER 334.

[32] *Id.* at Page I-1; ER 337.

[33] Declaration of Robert C. Ashby Concerning the United States Department of Transportation's Approval of Washington's Disadvantaged Business Enterprise Program Plan and Fiscal Year 2000 Goal, Exhibit 7 to Declaration of Charles E. Leggott, page 2, DT 100; ER 170.

[34] Declaration of Robert C. Ashby Concerning the United States Department of Transportation's Approval of Washington's Disadvantaged

(Continued on following page)

the USDOT may issue written interpretations or guidance on the DBE regulation, which are "valid and binding, and constitute the official position of the Department of Transportation" in circumstances where the General Counsel of the Department of Transportation has reviewed the document and "approved it as consistent with the language and intent of 49 C.F.R. part 26."[35] The USDOT Sample DBE Program was subjected to such review.[36] The USDOT Sample DBE Program states that "recipients may wish to use [the sample program] as a guide" and that "[t]he General Counsel of the Department of Transportation has reviewed this sample program and approved it as consistent with the language and intent of 49 C.F.R. Part 26."[37]

The Washington DBE plan complies with the requirements imposed by the USDOT's DBE regulations.[38] The WSDOT must comply with the terms of its approved DBE plan or risk ineligibility for federal highway funding.[39] Under 49 C.F.R. §26.101, the WSDOT may suffer the "suspension or termination of Federal funds" for DBE program deficiencies.[40]

Business Enterprise Program Plan and Fiscal Year 2000 Goal, Exhibit 7 to Declaration of Charles E. Leggott, page 8, DT 100; ER 176.

[35] *Id.*

[36] *Id.*

[37] *Id.* at pages 8-9; ER 176-177.

[38] Declaration of Brenda Richardson in Support of State Defendant's Motion for Summary Judgment, ¶3, DT 104; ER 316.

[39] *Id.*

[40] *Id.*

The WSDOT reviews every federally funded project to determine if a DBE contract goal should apply.[41] If appropriate, WSDOT assigns a DBE participation goal to the project based on a projection of their race-neutral DBE utilization to date, size of the contract, the type of work involved in the contract, and DBE availability.[42] This process is described at 49 C.F.R. § 26.51(d-f).[43] The WSDOT does not assign goals to projects without federal funding because the DBE program does not apply to such projects.[44]

Local government agencies spending federal funds for highway projects must establish their own approved DBE program or follow the WSDOT's.[45] The City of Vancouver has not established a DBE program and the WSDOT assigns DBE goals to the City's federal-aid highway projects if appropriate.[46] The WSDOT goal-setter follows the procedures set forth in the WSDOT DBE plan and the federal regulations.[47]

V. SUMMARY OF THE ARGUMENT

A. The trial court properly granted appellees' motions for summary judgment when it ruled the Transportation Equity Act for the 21st Century ("TEA-21"), Pub. L.

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[41] Declaration of Brenda Richardson in Support of State Defendant's Motion for Summary Judgment, ¶5, DT 104; ER 316-317.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at ¶6, DT 104; ER 317.

[46] *Id.*

[47] *Id.*

105-178, 112 Stat. 107 (1998) and its regulations (49 C.F.R. Part 26) were constitutional on its face under the strict scrutiny analysis set forth in *Adarand v. Peña*, 515 U.S. 200, 235, 115 S. Ct. 2097, 2117, 132 L. Ed. 2d 158 (1995) (*Adarand III*).

B. The trial court properly granted appellees' motions for summary judgment when it ruled that TEA-21 was constitutional as applied because Washington State's DBE plan complied with the requirements imposed by the U.S. Department of Transportation ("USDOT") and WSDOT did not have an independent legal obligation to establish the factual predicate for the WSDOT DBE program.

C. The City was also entitled to summary judgment in this matter because there was no evidence to support the conclusion that the City's inclusion of DBE goals in its contracts was the result of racial or gender based animus or intentional discrimination. The City was required, as a condition of receiving federal funding, to follow the WSDOT's DBE program since the City did not have its own DBE program. The WSDOT goal setter followed the procedures set forth in the approved WSDOT DBE plan and the federal regulations when determining the DBE goal for local governments receiving federal funding.

VI. ARGUMENT

A. Standard of Review

A review of a district court's grant of summary judgment is de novo. *Moran v. State of Washington*, 147 F.3d 839, 844 (9th Cir. 1998). Therefore, this Court sits in the same position as the district court and applies the same

summary judgment test that governed the district court's decision. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 630 (9th Cir. 1987).

When reviewing a grant of summary judgment, the Court limits its review to the record presented to the district court at the time of the summary judgment. *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988). The Court will not consider factual issues not presented to the trial court. *Id.*; *see also Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 812 (9th Cir. 1982) (appellant may not overturn a summary judgment by raising a factual issue on appeal not plainly disclosed as an issue in the trial court).

This Court may uphold a grant of summary judgment on a ground different than that on which the trial court relied. *Pritikin v. Department of Energy*, 254 F.3d 791, 796 (9th Cir. 2001), *cert. denied*, 534 U.S. 1133, 122 S. Ct. 1076, 151 L. Ed. 2d (2002) (Ninth Circuit may affirm district court's decision granting summary judgment "on any ground supported by the record"); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir. 1994). Not only "may" the Court affirm, it "must" in fact affirm. *Thos. P. Gonzalez Corp., v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980). "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Id.*, citing *Helvering v. Gowan*, 302 U.S. 238, 245, 58 S. Ct. 154, 158, 82 L. Ed. 224 (1937).

B. Summary Judgment Standard

Under Fed. R. Civ. P. 56(c), the entry of summary judgment is mandated when the evidence in the record

shows no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth. *United States v. First National Bank*, 652 F.2d 882, 887 (9th Cir. 1981). The materiality of a fact is determined by the substantive law on the issue. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 630 (9th Cir. 1987). Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. *Id.*

The moving party is entitled to a judgment as a matter of law if the non-moving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. *Celotex Corp.*, 477 U.S. at 322 – 323. A party opposing summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S. at 324. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Inferences must be drawn in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). However, the question is not whether there is literally no evidence, "but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Anderson*, 477 U.S. at 251. In a summary

judgment motion even the "existence of a scintilla of evidence in support of the appellant's position will be insufficient; there must be *evidence* on which a jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252, (emphasis added). The nonmoving party may not merely state that it will discredit the moving party's evidence at trial and proceed in the hope that something can be developed at trial in the way of evidence to support its claim. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d at 630, *citing Anderson, supra. Conclusory, nonspecific statements in affidavits are not sufficient, and "missing facts" will not be "presumed". Lujan v. Natl. Wildlife Fed'n.*, 497 U.S. 871, 888-889, 110 S. Ct. 3177, 3188-3189, 111 L. Ed. 2d 695 (1990). The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d at 631, n. 3.

C. City Appellee is Entitled to Summary Judgment

The City appellee is entitled to summary judgment in this matter on the following bases: (1) TEA-21 and its regulations were constitutional on its face; (2) TEA-21 and its regulations were constitutional as applied and WSDOT did not have an independent legal obligation to establish the factual predicate for the WSDOT DBE program; (3) There was no evidence to support the conclusion that the City's inclusion of DBE goals in its contracts was the result of racial or gender based animus or intentional discrimination.

Appellant Western States Paving's case against the City appellee is dependent upon the outcome of Western States' challenge to the federal DBE program and federal laws and to the state's implementation of the federal DBE program and federal laws. It is anticipated that the appellate briefs of Federal, State, and County appellees will address the same issues City appellee has raised herein. The Federal appellees will more thoroughly address and defend the constitutionality of TEA-21 on its face; the State appellee will more thoroughly address and defend the constitutionality of TEA-21 as applied and the argument that the State did not have an independent legal obligation to establish the factual predicate for the WSDOT DBE program, and; the County appellee will more thoroughly discuss the inability of appellant to establish discriminatory intent to recover under 42 U.S.C. §§ 1981, 1983, and 2000(d).

In accordance with Fed. R. App. P. 28(i), the City appellee wishes to adopt by reference portions of the Federal, State, and County appellees' briefs that are consistent with the City's arguments set forth herein.

1. TEA-21 and its Regulations Were Constitutional on its Face.

a. Strict Scrutiny Review.

The United States Supreme Court in *Adarand v. Peña*, 515 U.S. 200, 227, 115 S. Ct. 2097, 2113, 132 L. Ed. 2d 158 (1995) (*Adarand III*), held that

> all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are

constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Once the governmental entity has shown proof of compelling interest in remedying past discrimination, and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000).

i. Compelling Interest.

There are several cases that have dealt directly with the constitutionality of TEA-21 and its regulations. *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003)[48]; *Adarand v. Slater* (*Adarand VII*), 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed as improvidently granted*, 534 U.S. 103, 122 S. Ct. 511, 151 L. Ed. 2d 489 (2001). Both cases found TEA-21 and its regulations to be constitutionally valid. In *Adarand VII*, the Tenth Circuit Court of Appeals provided a detailed analysis of the efforts taken by the legislative and executive branches of the federal government to use race-conscious means to remedy the effects of historical and present-day racial discrimination existing in the highway construction industry. The Court in *Adarand VII* thoroughly reviewed the evidence reviewed by Congress, and

[48] The 8th Circuit Court of Appeals *Sherbrooke Turf* case is comprised of two separate actions that were combined for purposes of appeal – *Sherbrooke Turf, Inc. v. Minn. Dept. of Transp.*, 2001 WL 15028421 (D. Minn. November 15, 2001) and *Gross Seed Co. v. Neb. Dept. of Roads*, No. 4:00 CV 3073 (May 26, 2002).

the findings made by Congress, before adopting TEA-21. *See Adarand VII*, 228 F.3d at 1167-76.

The Tenth Circuit Court of Appeals in *Adarand VII* developed a four-part inquiry to determine whether the interest served by use of race-conscious goals can be compelling:

> First, we must determine whether the government's articulated goal in enacting the race-based measures at issue in this case is appropriately considered a "compelling interest" under the governing case law; if so, we must then set forth the standards under which to evaluate the government's evidence of compelling interest; third, we must decide whether the evidence presented by the government is sufficiently strong to meet its initial burden of demonstrating the compelling interest it has articulated; and finally, we must examine wether [sic] the challenging party has met its ultimate burden of rebutting the government's evidence such that the granting of summary judgment to either party is proper.

Adarand VII, 228 F.3d at 1164.

(a) ***Legislative goal.*** To survive strict scrutiny, the government must first articulate a legislative goal that is properly considered a compelling government interest. *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 969 (8th Cir. 2003). The Tenth Circuit Court of Appeals in *Adarand VII* readily concluded that "the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements." *Adarand VII*,

228 F.3d at 1165. "[A]ny public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492, 109 S. Ct. 706, 721, 102 L. Ed. 2d 854 (1989). The geographic scope of Congress' reach is "society-wide" and therefore nationwide. *Adarand VII*, 229 F.3d at 1165.

(b) ***Standards for evaluation of evidence.*** In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, the court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Adarand VII*, 228 F.3d at 1166. Any findings Congress made as to the entire construction industry are relevant. *Id.*

(c) ***"Strong basis in evidence".*** In addition to identifying a compelling government interest, the government must demonstrate a "strong basis in evidence" supporting its conclusion that race-based remedial action was necessary to further that interest. *Sherbrooke Turf, Inc.*, 345 F.3d at 969. *See City of Richmond v. Croson*, 488 U.S. at 500, 109 S. Ct. at 725. This involves an evaluation of the evidence proffered by the government to support the existence of past and present discrimination in the publicly funded highway construction subcontracting market. The Court in *Adarand VII* considered statistical and anecdotal evidence, both direct and circumstantial. *Adarand VII*, 228 F.3d at 1166. The Court in *Adarand VII* found that Congress had before it a strong basis in evidence for its conclusion that remedial action was necessary. The Court cited numerous congressional

investigations, hearings, and statistical and anecdotal evidence to support its conclusion that race-based measures were necessary. *Adarand VII*, 228 F.3d at 1167-76. The Eighth Circuit Court of Appeals in *Sherbrooke Turf* agreed with the Court in *Adarand VII* after it "took a hard look at the evidence". *Sherbrooke Turf*, 345 F.3d at 970. The Eighth Circuit Court of Appeals concluded that Congress had a strong basis in evidence to supports its conclusion that race-based measures were necessary for the reasons stated in *Adarand VII*. *Id.* The *Adarand VII* Court decided the evidence presented by the government was sufficiently strong to meet its initial burden of demonstrating the compelling interest it had articulated, thus shifting the burden to Adarand on the fourth prong of the inquiry. 228 F.3d at 1176.

(d) ***Has challenging party met its burden?*** The last part of the four-part inquiry is whether the challenging party has met its ultimate burden of rebutting the government's evidence that remedial action was necessary. The Court in *Adarand VII* rejected Adarand's characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous "disparity studies" cited by the government and its amici curiae as supplemental evidence of discrimination. *Adarand VII*, 228 F.3d at 1175. The Court also rejected Adarand's contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. *Adarand VII*, 228 F.3d at 1176, n. 18.

The Court concluded that the government satisfied its burden of production regarding the compelling interest for

a race-conscious remedy and that no evidence presented by Adarand demonstrated the unconstitutionality of that affirmative action program. *Adarand VII*, 228 F.3d at 1176.

In the current case, appellant Western States argues that the trial court must scrutinize each piece of evidence before Congress and evaluate its relevance and/or accuracy before siding with the government, and that the trial court owes no deference to Congress. "The fact-finding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary." *Croson*, 488 U.S. at 500, 109 S. Ct. at 725. While the trial court gave some deference to Congress's fact-finding process in connection with TEA-21, the trial court did not give deference to Congress's finding of a compelling interest or its conclusion that its remedy is narrowly tailored to that interest.[49] In the current case, the trial court took the same "detailed, skeptical, non-deferential analysis" recommended by Judge Michel in *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 262 F.3d 1306 (Fed. Cir. 2001), and actually performed by the Tenth Circuit in *Adarand VII*.[50] The trial court did take into account the 2001 GAO study (noting methodology weaknesses or limits in the data), but this report did not persuade the court that Congress lacked substantial evidence upon which to base its compelling interest in enacting TEA-21 in response to the effects of discrimination in the highway construction industry that was shown and documented in various studies and statistics and other

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[49] Order, p. 11-12, DT 148; ER 26-27.

[50] Order, p. 12, DT 148; ER 27.

evidence considered by the trial court and the Court in *Adarand VII*.[51]

Appellant Western States argues that the evidence Congress and the trial court considered did not come from or apply to every state or locale in the nation and therefore, there is no strong basis in evidence for the imposition of race-conscious goals in Washington State.[52] A similar argument was raised by the contractor in *Sherbrooke Turf, Inc.* In that case, the Eighth Circuit Court of Appeals concluded:

> Compelling government interest looks at a statute or government program on its face. When the program is federal, the inquiry is (at least usually) national in scope. If Congress or the federal agency acted for a proper purpose and with a strong basis in evidence, the program has the requisite compelling government interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation. Thus, we reject appellant's contention that their facial challenges to the DBE program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in *Minnesota* and *Nebraska*. On the other hand, a valid race-based program must be narrowly tailored, and to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed.

Sherbrooke Turf, Inc., 345 F.3d at 970-1.

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[51] Order, p. 12, DT 148; ER 27.

[52] Brief of Appellant, p. 20.

In the case at bar, the trial court found that the compelling interest requirement of the strict scrutiny analysis had been met.[53] In the present case, an analysis of the requisite four-part inquiry shows that the compelling interest requirement of the strict scrutiny analysis has been met.

ii. Narrowly Tailored.

The second step in determining whether a race-based action is constitutional is to see if it passes the "narrow tailoring" test. The United States Supreme Court in *U.S. v. Paradise*, 480 U.S. 149, 171, 107 S. Ct. 1053, 1066, 94 L. Ed. 2d 203 (1987), suggested four factors for determining whether a race-conscious remedy passes the "narrow tailoring" test: (a) the necessity for the relief and efficacy of alternative remedies; (b) the flexibility and duration of the relief, including the availability of waiver provisions; (c) the relationship of the numerical goals to the relevant labor market, and; (d) the impact of the relief on the rights of third parties. Justice O'Connor's majority opinion in *Croson* adds another factor to the narrow tailoring test: under – or over-inclusiveness of the DBE classification. *Croson*, 488 U.S. at 508, 109 S. Ct. at 729.

(a) ***Necessity for Relief and Alternatives.*** In *Adarand VII*, the Tenth Circuit pointed out that the district court in *Adarand v. Peña*, 965 F. Supp. 1556, 1582-83 (D. Colo. 1997), found that Congress over a period of decades attempted to correct by race-neutral means the problem of too few minority subcontractors for government construction contracts, and only after it continued to find

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[53] Order, p. 12, DT 148; ER 27.

discriminatory effects did it first implement a race-conscious remedy. *Adarand VII*, 228 F.3d at 1178. The *Adarand VII* Court stated, "[t]he long history of discrimination in, and affecting, the public construction procurement market – despite the efforts dating back at least to the enactment in 1958 of the SBA [Small Business Act] to employ race-neutral measures – places a formidable burden on both existing and would-be minority participants and thus justifies race-conscious action to address a decidedly racial disparity." *Adarand VII*, 228 F.3d at 1178. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require "serious, good faith consideration of workable race-neutral alternatives." *Grutter v. Bollinger*, 539 U.S. 306, 339, 123 S. Ct. 2325, 2344-5, 156 L. Ed. 2d 304 (2003).

(b) ***Flexibility and Duration.*** The TEA-21 DBE program has flexibility. Pursuant to 49 C.F.R. § 26.15, recipients of federal highway construction funds can apply for waivers and exemptions from any of the provisions, including contract goals. The program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds $750,000 cannot qualify as economically disadvantaged. *See* 49 C.F.R. §26.67(b). Recipients may not deny a contract to a bidder that demonstrated that it has made good faith efforts to achieve the contract goal, even if it was unable to meet that goal. 49 C.F.R. § 26.53(a)(2). Prime contractors are not required to accept higher quotes from DBEs if the price difference is excessive or unreasonable. 49 C.F.R. Appendix A to Part 26 – "Guidance Concerning Good Faith Efforts," at (IV)(D)(2).

In the current case, there is no evidence that the general contractors of any of the disputed contracts sought

waivers from the contract's DBE goals. The USDOT DBE program has flexible waiver provisions.

The DBE portion of TEA-21, authorized under § 1101(b) was enacted in 1998. It had an expiration date of September 30, 2003. TEA-21 is subject to periodic congressional reauthorization. In addition, annually, each DBE must establish its continuing eligibility. 49 C.F.R. §26.83(j). The DBE program is limited in its duration.

(c) ***Relationship of Numerical Goals to the Relevant Labor Market.*** 49 C.F.R. § 26.45(b) requires recipients to determine the level of DBE participation on USDOT assisted contracts that it would expect absent the effects of discrimination. 49 C.F.R. § 26.45(c) and (d) (Steps 1 and 2) set forth the specific steps that each recipient must follow in establishing its overall goal. These steps require the State recipient to focus on establishing realistic goals for DBE participation in the relevant contracting markets. After calculating the expected levels of DBE participation, recipients must adjust those figures to account for the effects of other factors, including non-discriminatory factors causing underutilization of DBEs, so that the estimates reflect the level of DBE participation that would be expected in the absence of discrimination.

In the present case, a detailed analysis of the method used by WSDOT to arrive at its DBE program is contained in the Declaration of Robert C. Ashby, the Deputy General Counsel for Regulations and Enforcement, Office of the General Counsel, United States Department of Transportation.[54] Steps 1 and 2 were followed by WSDOT. The

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[54] Declaration of Robert C. Ashby Concerning the United States Department of Transportation's Approval of Washington's Disadvantaged Business Enterprise Program Plan and Fiscal Year 2000 Goal,

(Continued on following page)

USDOT reviewed and approved WSDOT's DBE program, including its goal setting methodology for FY 2000.[55]

(d) ***Impact on Third Parties is De Minimis.*** There is the possibility in any remedial action that "innocent persons may" sometimes "be called upon to bear some of the burden of the remedy". *Wygant v. Jackson Bd. Of Education*, 476 U.S. 267, 281, 106 S. Ct. 1842, 1850; 90 L. Ed. 2d 260 (1986). "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Wygant*, 476 U.S. at 281, 106 S. Ct. at 1850 (citations omitted).

Congress and USDOT have taken steps to minimize the race-based nature of the DBE program in TEA-21. Its benefits are directed at small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a rebuttable presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealth minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged but can demonstrate actual social and economic disadvantage. *See* 49 C.F.R. §§ 26.61 and 26.67. Thus, race is made relevant in the program, but is not a determinative factor. *Sherbrooke Turf*, 345 F.3d at 972-3. In addition, the regulations require recipients to ensure that DBEs are not "so overconcentrated in a

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Exhibit 7 to Declaration of Charles E. Leggott, pages 4-6, DT 100; ER 172-174.

[55] *Id.* at p. 1-18, DT 100; ER 169-186.

certain type of work as to unduly burden the opportunity of non-DBE firms to participate." 49 C.F.R. § 26.33(a).

In the present case, the burden to appellant Western States due to the DBE program has been negligible. While Western States alleges that it lost work on three paving subcontracts over a two year period, it was awarded at least 26 contracts in 2000 and 23 contracts in 1999.[66] Plaintiff, which bids on asphalt and paving work as both a prime contractor and subcontractor, had gross revenues of $9 million in 2000 and $11 million in 1999.[67] The impact on Western States as a result of this remedial program is de minimis. "[T]he possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored." *Adarand VII*, 228 F.3d at 1183.

(e) ***Over – or – Under Inclusiveness.*** The last factor in determining whether the USDOT DBE program passes the "narrow tailoring" test is whether the program is over or under inclusive. The Supreme Court in *Croson* expressed the concern that a government entity undertake the necessary administrative effort to tailor the remedial relief to those who have truly suffered the effects of prior discrimination. *Croson*, 488 U.S. at 508, 109 S. Ct. at 729-730. TEA-21 imposes an economic limitation ($750,000 net worth) for DBE certification. Therefore, successful women and minority run businesses will not qualify for DBE

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[66] Federal Defendants' First Set of Interrogatories to Plaintiff, Response to Interrogatory No. 9, Exhibit 6 to Declaration of Charles E. Leggott, DT 100; ER 157-162.

[67] Federal Defendants' First Set of Interrogatories to Plaintiff, Response to Interrogatory No. 24, Exhibit 6 to Declaration of Charles E. Leggott, DT 100; ER 164.

certification and cannot take advantage of this remedial program.

Western States asserts that the USDOT DBE program permits the inclusion of racial groups that have never suffered discrimination in the construction industry.[58] To support its argument, Western States points to WSDOT's responses to Western State's First Interrogatories Numbers 6 – 13[59]. In these interrogatories, Western State asks WSDOT to identify complaints or incidents of alleged discrimination against various groups of people that occurred on WSDOT-administered contracts. In its responses, WSDOT admitted knowledge of only three "official" complaints and a number of "informal complaints".[60] Appellant argues that since so few complaints are known that any DBE program that includes race-conscious goals is not narrowly tailored.[61] The evidence before Congress concerned the effects of private discrimination throughout the industry. With TEA-21, Congress was establishing a national remediation program. Congress provided the factual basis for TEA-21. (*See* discussion above in Section VI.C.1.a.i.(c) "Strong basis in evidence"; *See also Adarand VII*, 228 F.3d at 1167-76.)

Contrary to Western State's assertions, a state recipient of federal highway funds is not required to independently establish that its DBE program satisfied the strict scrutiny standard. *Milwaukee County Pavers Assn. v.*

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[58] Appellant's Opening Brief at p. 26-27.

[59] WSDOT First Response to Western States First Interrogatories, Exhibit 2 to Sworn Statement of Gary E. Lofland, DT 118; ER 209-211.

[60] *Id.* at p. 9-11, DT 118; ER 209-211.

[61] Appellant's Opening Brief, p. 24.

Fiedler, 922 F.2d 419, 423-424 (7th Cir.) *cert. denied*, 500 U.S. 954, 111 S. Ct. 2261, 114 L. Ed. 2d 714 (1991). A state may participate in the federal DBE program without making the "particularized findings" of discrimination otherwise required for a race-conscious program operated by a state or local governments. *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The TEA-21 and its regulations pass the "narrow tailoring" test. Congress had a "strong basis in evidence" to support a compelling interest in eliminating the effects of discrimination in the highway construction industry. In response, Congress narrowly tailored a remedy to address the problem it intended to solve. In conclusion, TEA-21 and its regulations are constitutional on its face under strict scrutiny analysis.

The Federal appellees will more thoroughly address the issues discussed in this section (VI.C.1). In accordance with Fed. R. App. P. 28(i), City appellee wishes to adopt by reference portions of Federal appellees' brief that are consistent with the City's arguments set forth herein.

b. Gender Preferences.

TEA-21 contains both race-conscious and gender-conscious provisions. Classifications based upon gender must be justified by "an exceedingly persuasive justification" and "serve important governmental objectives". *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331, 3336, 73 L. Ed. 2d 1090 (1982). This level of scrutiny is intermediate. Since TEA-21 and its regulations meet the higher standard of strict scrutiny, it necessarily complies with the intermediate scrutiny reserved for gender-based classifications.

2. TEA-21 and its Regulations Were Constitutional as Applied.

a. WSDOT is Not Required to Establish the Need For, or Defend, a DBE Program When Following Federal Law and Regulations.

Appellant Western States argues that WSDOT is required to independently establish the need for, and defend the constitutionality of, the WSDOT DBE program in this case.[62] In support of this argument, Western States cites to a number of cases that address state or local statutes or programs. E.g., *Monterey Mechanical Co., v. Wilson*, 125 F.3d 702 (9th Cir. 1997) (state program); *Coral Const. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991) (county program). The line of cases that Western States cites, which discuss state or local statutes or programs, do not apply in the present situation because the program in question is a federal program, and there is a difference between the state's power and Congress' power to remedy racial discrimination.

The United States Supreme Court in *Richmond v. Croson*, 488 U.S. 469, 489-91, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), rejected the argument that a state's power to remedy racial discrimination is equal to that of Congress under § 5 of the Fourteenth Amendment.

The court in *Milwaukee County Pavers Assoc. v. Fiedler*, 731 F. Supp. 1395 (W.D. Wisc. 1990), recognized this difference when it considered two different programs

[62] Appellant's Opening Brief, p. 22-29.

to assist DBEs – one state-funded and one federally-funded. The court in *Milwaukee County Pavers Assoc. v. Fiedler* enjoined the state program and refused to enjoin the federal program.

The court in *Milwaukee County Pavers Assoc. v. Fiedler*, 922 F.2d 419, 424 (7th Cir. 1991), affirmed the decision of the trial court, stating that,

> [T]he federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. And one way it can do that is by authorizing states to do things that they could not do without federal authorization.

A state or local government may participate in the federal DBE program without making the "particularized findings" of discrimination required for a race-conscious program to be initiated by a state or local government. *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991). The court in *Tennessee Asphalt* concluded,

> [E]very aspect of participation in the federal highway program is mandated by Congress. And, since "Congress [can] mandate state and local compliance with [a] set-aside program under its §5 power to enforce the Fourteenth Amendment," *Croson*, 488 U.S. at 487, a state's compliance with the mandates of a federal scheme is nothing more than compliance with federal law.

Id. at 975. The court in *Milwaukee County Pavers Assoc. v. Fiedler* stated,

> In so far as the state is merely doing what the [federal] statute and regulations envisage and

> permit, the attack on the state is an impermissible collateral attack on the [federal] statute and regulations. We add that the federal regulations explicitly permit the state or other entity receiving the grant to apply the presumption without investigating the situation of particular applicants.

Milwaukee County Pavers Assoc., 922 F.2d at 424.

WSDOT and the City of Vancouver were merely doing what the federal statute and regulations authorized and envisioned. Thus, neither the state nor the local government is required to establish the need for, or defend the constitutionality of, the required DBE program when following federal law and regulations.

b. WSDOT DBE Plan Complies With the Federal Requirements.

The WSDOT's actions complied with the federal DBE requirements. The USDOT issued a final rule establishing a DBE program regulation under the authority of TEA-21.[63] As required by USDOT's regulation, recipients of certain categories of Federal transportation funding must submit to the FHWA, for its review and approval, a DBE program conforming to the USDOT's DBE regulation.[64] In response to this, WSDOT developed its DBE Program and submitted it to FHWA for review and approval. FHWA

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[63] Declaration of Robert C. Ashby Concerning the United States Department of Transportation's Approval of Washington's Disadvantaged Business Enterprise Program Plan and Fiscal Year 2000 Goal, Exhibit 7 to Declaration of Charles E. Leggott, page 2, DT 100; ER 170.

[64] *Id.*

reviewed and approved WSDOT's current DBE plan in 2000 and WSDOT's previous DBE plan in 1999.[65]

USDOT and/or FHWA approved the current Washington DBE Program on April 5, 2000 based on the Program's compliance and consistency with the USDOT's/FHWA's DBE regulations.[66] Washington State's DBE Program closely follows a "Sample DBE Program" developed by USDOT and which was provided to the states as an example of a legally sufficient DBE program under the regulation.[67] The USDOT DBE regulation provides that the USDOT may issue written interpretations or guidance on the DBE regulation, which are "valid and binding, and constitute the official position of the Department of Transportation" in circumstances where the General Counsel of the Department of Transportation has reviewed the document and "approved it as consistent with the language and intent of 49 C.F.R. part 26."[68] The USDOT Sample DBE Program was subjected to such review.[69] The USDOT Sample DBE Program states that "recipients may wish to use [the sample program] as a guide" and that

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[65] Declaration of Brenda Richardson in Support of State Defendant's Motion for Summary Judgment, ¶3, DT 104; ER 316.

[66] Declaration of Robert C. Ashby Concerning the United States Department of Transportation's Approval of Washington's Disadvantaged Business Enterprise Program Plan and Fiscal Year 2000 Goal, Exhibit 7 to Declaration of Charles E. Leggott, page 2, DT 100; ER 170.

[67] Declaration of Robert C. Ashby Concerning the United States Department of Transportation's Approval of Washington's Disadvantaged Business Enterprise Program Plan and Fiscal Year 2000 Goal, Exhibit 7 to Declaration of Charles E. Leggott, page 8, DT 100; ER 176.

[68] *Id.*

[69] *Id.*

"[t]he General Counsel of the Department of Transportation has reviewed this sample program and approved it as consistent with the language and intent of 49 C.F.R. Part 26."[70]

The Washington DBE plan complies with the requirements imposed by the USDOT's DBE regulations.[71] The WSDOT must comply with the terms of its approved DBE plan or risk ineligibility for federal highway funding.[72] Under 49 C.F.R. §26.101, the WSDOT may suffer the "suspension or termination of Federal funds" for DBE program deficiencies.[73]

The WSDOT reviews every federally funded project to determine if a DBE contract goal should apply.[74] If appropriate, WSDOT assigns a DBE participation goal to the project based on a projection of their race-neutral DBE utilization to date, size of the contract, the type of work involved in the contract, and DBE availability.[75] This process is described at 49 C.F.R. § 26.51(d-f).[76] The WSDOT does not assign goals to projects without federal funding because the DBE program does not apply to such projects.[77]

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[70] *Id.* at pages 8-9; ER 176-177.

[71] Declaration of Brenda Richardson in Support of State Defendant's Motion for Summary Judgment, ¶3, DT 104; ER 316.

[72] *Id.*

[73] *Id.*

[74] Declaration of Brenda Richardson in Support of State Defendant's Motion for Summary Judgment, ¶5, DT 104; ER 316-317.

[75] *Id.*

[76] *Id.*

[77] *Id.*

Local government agencies spending federal funds for highway projects must establish their own approved DBE program or follow the WSDOT's.[78] The City of Vancouver has not established a DBE program and the WSDOT assigns DBE goals to the City's federal-aid highway projects if appropriate.[79] The WSDOT goal-setter follows the procedures set forth in the WSDOT DBE plan and the federal regulations.[80]

WSDOT and the City of Vancouver were merely doing what the federal statute and regulations authorized and envisioned. WSDOT is simply acting as an agent of USDOT in helping to administer the federal program. If the state does exactly what the federal statute expects it to do, and the federal statute is constitutional, the state cannot be thought to have violated the Constitution. *Milwaukee County Pavers Assoc.*, 922 F.2d at 423. WSDOT complied with the federal statute and the regulations, and, therefore, TEA-21 was constitutional as applied in this case.

While implementing the federal DBE program, WSDOT acts as a federal agent and not under color of state law. *Milwaukee County Pavers Assoc.*, 922 F.2d at 423. Because WSDOT was not acting under color of state law, the WSDOT cannot be liable under either 42 U.S.C. §1981 or §1983. The City is one step further removed. If WSDOT cannot be liable, the City also cannot be liable. Similarly, WSDOT cannot be liable under Title VI (42 U.S.C. §2000[illegible] for actions taken to implement the federal DBE [illegible]ogram. *See Miami University Wrestling*

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[78] *Id.* at ¶6, DT 104; ER 317.

[79] *Id.*

[80] *Id.*

Club v. Miami University Club, 302 F.3d 608, 614 (6th Cir. 2002). If WSDOT cannot be liable, the City also cannot be liable for complying with the federal requirements.

The State appellees will more thoroughly address the issues discussed in this section (VI.C.2). In accordance with Fed. R. App. P. 28(i), City appellee wishes to adopt by reference portions of State appellees' brief that are consistent with the City's arguments set forth herein.

3. There is No Evidence of Racial or Gender Based Animus or Intentional Discrimination.

Appellant Western States alleged the actions of the appellees deprived it of civil rights, privileges, and immunities secured by the Constitution and 42 U.S.C. §1981, 42 U.S.C. § 1983, and 42 U.S.C. § 2000(d) (Title VI).[81] These claims are dependent upon the assertion that TEA-21 is unconstitutional. If TEA-21 is constitutional, Western States cannot prevail on these causes of action. *If* TEA-21 is found to be unconstitutional, Western States still cannot prevail because there is no evidence to support the conclusion that the City's inclusion of DBE goals in its contracts was the result of racial or gender based animus or intentional discrimination, a required element in these causes of action.

As discussed above, the City was required to follow the WSDOT DBE program since the City did not have its own DBE program. Federal funding on those City contracts was conditioned upon compliance with the WSDOT

[81] Complaint ¶ 22, Second Claim, DT 31; ER 39.

DBE program that had received approval by USDOT/FHWA. The DBE goals on the City projects were set by a WSDOT goal-setter who followed the procedures set forth in the WSDOT DBE plan and the federal regulations.

a. 42 U.S.C. § 1981 and 42 U.S.C. § 1983 Claims.

Proof of discriminatory intent is required for Western States to recover damages under 42 U.S.C. § 1981 or 42 U.S.C. § 1983.

In *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), the Court held that claims of racial discrimination brought under 42 U.S.C. § 1981 cannot rest solely on racially disproportionate impact, but rather, must be premised upon proof of a discriminatory motive or purpose. The requirement for proof of intentional discrimination was recognized in the Ninth Circuit in *Officers for Justice v. Civil Service Commission of San Francisco*, 688 F.2d 615, 627 n. 14 (9th Cir. 1982).

The requirement of proving discriminatory intent in order to recover damages under 42 U.S.C. § 1983 was recognized by the Ninth Circuit in *Chavez v. Tempe Union High School Dist.*, 565 F.2d 1087, 1095 (9th Cir. 1977):

> Because section 1983 incorporates by reference the terms of the Constitution itself, it appears that an action under this statute – at least to the extent it relies upon the Equal Protection Clause of the Fourteenth Amendment – requires proof not only of discriminatory impact, but also of discriminatory intent as established by the Supreme Court in *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976).

Appellant cannot show that the City of Vancouver's inclusion of DBE goals in its federally funded highway contract was a result of discriminatory animus or intentional discrimination. Rather, it was done to comply with the federal and state requirements relating to FHWA funding. Therefore, the City is entitled to dismissal of Western State's claims based upon 42 U.S.C. §§ 1981 and 1983.

b. 42 U.S.C. § 2000(d) (Title VI) Claim.

The Supreme Court established in *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582, 584, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983), and more recently confirmed in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), that plaintiffs cannot recover compensatory damages under Title VI unless they prove intentional discrimination.

Justice White made it clear in *Guardians* that while a plaintiff may be entitled to declaratory or injunctive relief under 42 U.S.C. § 2000(d), absent a showing of discriminatory intent, compensatory damages are not available. He stated:

> The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. § 2000(d) *et seq.*, and administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent. However, I conclude that the

> judgment below should be affirmed on other grounds, because, in the absence of proof of discriminatory animus, compensatory relief should not be awarded to private Title VI plaintiffs; unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations.

Appellant cannot show that the City had discriminatory animus in this case. The City's inclusion of the DBE goals was done to comply with the federal and state requirements relating to FHWA funding. The City does not have its own DBE policy or program. Therefore, the City is entitled to summary judgment dismissal of Western State's claim under 42 U.S.C. 2000(d) (Title VI).

It is anticipated that the County appellee will more thoroughly address the issues discussed in this section (VI.C.3). In accordance with Fed. R. App. P. 28(i), City appellee wishes to adopt by reference portions of County appellee's brief that are consistent with the City's arguments set forth herein.

VII. CONCLUSION

Based upon the foregoing argument and authority, City appellee submits: (1) The trial court correctly ruled when it held the Transportation Equity Act for the 21st Century (TEA-21) and its regulations (49 C.F.R. Part 26) were constitutional on its face under the strict scrutiny analysis set forth in *Adarand III*; (2) The trial court correctly ruled when it held that TEA-21 was constitutional as applied because Washington State's DBE plan was in compliance with the requirements imposed by USDOT and WSDOT did not have an independent legal

obligation to establish the factual predicate for the WSDOT DBE program, and; (3) City appellee is entitled to summary judgment dismissal on other grounds submitted to the trial court if this Court rules that TEA-21 was unconstitutional on its face or as applied.

City appellee respectfully requests that the determination and judgment of the trial court be affirmed in all respects.

VIII. STATEMENT OF RELATED CASES

City appellee does not have knowledge of any related cases pending in this Court.

IX. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,555 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point New Times Roman font.

DATED this 20th day of February, 2004.

Respectfully submitted,

/s/ Alison J. Chinn
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No. 03-35783

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN STATES PAVING CO INC,
Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION; Douglas MacDonald, Secretary of the Washington Department of Transportation; CITY OF VANCOUVER, Washington; CLARK COUNTY;
Appellees,

and

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF TRANSPORTATION AND FEDERAL HIGHWAY ADMINISTRATION
Intervenors-Appellees.

On Appeal from the United States Court
for the Western District of Washington at Tacoma

BRIEF OF APPELLANT

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Corporate Disclosure Statement

Western States Paving Co Inc is a Washington corporation that is wholly owned by Superior Asphalt and Concrete Co Inc. The stock is privately held.

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I STATEMENT OF JURISDICTION

Western States Paving Co Inc challenges the use of race and gender based preferences in the "Disadvantaged Business Enterprise Participation Plan" established by the Washington Department of Transportation under the regulations adopted by the USDOT to implement the Transportation Equity Act for the Twenty First Century. (TEA-21)

The District Court had subject matter jurisdiction pursuant to 29 USC § 1331 (Federal Question); 29 USC § 1343 (Civil Rights); 28 USC § 2201 (Declaratory Judgment); and 28 USC § 1367 (Supplemental Jurisdiction).

An Order granting summary judgment in favor of the defendants was entered on September 9, 2003. (ER 15) Judgment was entered on September 9, 2003. (ER 34) A Notice of Appeal was filed by Western States on September 22, 2003 (ER 1) and is timely under FRAP 4(a)(1).

This court has jurisdiction pursuant to 29 USC § 1291.

II ISSUES PRESENTED

1. Whether the State of Washington has a compelling interest to include race and sex based preferences in its affirmative action program for disadvantaged women and minorities in the highway construction industry even if the state cannot, either alone, or in conjunction with the federal government, provide a "firm basis" for concluding that a pattern or practice of past discrimination has infected the Washington highway construction industry.

2. Whether the federal government has a compelling interest to requiring the State of Washington to include race and sex based preferences in that state's affirmative action plan for "disadvantaged" business enterprises in the highway construction industry if the federal government cannot, either alone or in conjunction with the State, provide a "firm basis" for concluding that a pattern or practice of discrimination has infected the Washington highway construction industry.

3. Whether a federal program that requires each of the fifty states to independently develop and implement an affirmative action program for "disadvantaged business enterprises" in the highway construction industry is narrowly tailored, if that program requires, or purports to authorize, each and every state to include racial and gender preferences in its affirmative action plan without regard to the evidence, or lack thereof, of past discrimination in any one state.

4. Whether the disadvantaged business enterprise program developed by the state of Washington is narrowly tailored if that program includes race and sex based preferences when there has been no known discrimination in the Washington highway construction industry.

III STATEMENT OF THE CASE

On April 10, 2000 a complaint was filed against the WSDOT and the City of Vancouver. (DT 1[1]) The USDOT Motion to Intervene was granted on June 23, 2003. (DT 16) An amended complaint was filed adding Clark County as a defendant on November 15, 2000. (DT 31) The USDOT Motion to Dismiss for lack of standing was denied on May 17, 2001. (DT 51)

An Order staying the case pending the United States Supreme Courts decision in *Adarand* was entered on June 12, 2001. (DT 61) The case was reopened on December 31, 2001. (DT 79)

The Defendant's Motion for Summary Judgment was granted on September 3, 2003. (ER 15) Judgment was entered on September 9, 2003. (ER 34)

IV STATEMENT OF FACTS

The United States Department of Transportation (USDOT) requires each recipient of funds allocated under TEA-21 to develop a disadvantaged business enterprise program which includes "aspirational goals" for Disadvantaged Business Enterprise (DBE) utilization. 49 CFR 26.21; 26.41. Minorities and women are presumed to be disadvantaged. 49 CFR 26.67.

The WSDOT adopted a DBE Participation Plan to "provide women and minorities with equal opportunity to construction." (ER 337) Through this plan the WSDOT sets an annual goal for DBE utilization. The word "aspirational"

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[1] DT refers to Docket Text of the Clerk's record. (ER 3)

is not used in the WSDOT Plan. To ensure the annual goal is met, the WSDOT sets goals on individual contracts which specifies the percentage of the contract price that must be awarded to DBEs by the prime contractor. Meeting the specified goal is a mandatory "condition of award." (ER 285, 295, 327)

Western States incurred injury that forms the basis of this case when on at least three occasions it submitted a low quote for asphalt and paving work, but it's low quote was rejected in favor of a significantly higher quote submitted by a DBE. (ER 298-300) In each case, the selection of the higher quote DBE was based upon the requirement that the specified percentage of the contract must be awarded to a DBE. (ER 304-5, 307,312)

The WSDOT justifies the use of race and sex based preferences by relying upon the federal program. However, in argument before the District court, the federal defendants acknowledged:

> The state would have to have some evidence of past or current effects of discrimination to use race conscious goals . . . only to the degree that they can determine its [disparity in use] caused by race may they then use race conscious goals to remedy it.
>
> (ER 314)

The State is not aware of any discrimination that has occurred in any transportation contract. (ER 209-211) The State is unaware of discrimination by lending or sureties. (ER 212, 379) No disparity study has been conducted by the State. (ER 326, 379) The USDOT is not aware of any discrimination in the Washington highway construction industry. (ER 220-225) A federal "benchmark study"

conducted by the Department of Commerce shows no disparity, let alone discrimination, in use of DBEs in federal contracts in Washington. (ER 241; *Adarand v. Mineta*, 534 US 103, 111 n2 (2001))

Despite the lack of evidence of discrimination, the state continues to set and enforce mandatory condition of award goals requiring that a specified percentage of a contract be awarded to DBE's. (Http://www.wsdot.wa.gov/oeo/dmwbe.htm)

V SUMMARY OF ARGUMENT

Racial classifications, including those used to remedy past discrimination are so harmful that they are presumptively invalid and can be upheld only upon a showing of extraordinary justification. Such classifications must satisfy strict scrutiny by the courts and are constitutional only if they are "narrowly tailored measures that further compelling government interests." There must be a "strong basis in evidence" to show remedial action was necessary. Gender preferences must serve important governmental objectives and have an extremely persuasive justification.

Congress enacted TEA-21, a highway and transportation appropriation, which provides that not less than 10% of the funds appropriated shall be expanded on Disadvantaged Business Enterprises unless the secretary determines otherwise. The regulations adopted by the USDOT to implement TEA-21 determined the 10% was only an aspirational goal. Each recipient of TEA-21 funds must analyze local market conditions. This is a departure from the previous highway appropriation plans of STURAA and ISTEA which required mandatory DBE set asides.

The WSDOT implemented a DBE plan that includes mandatory condition of award goals for DBE use on individual contracts. WSDOT practice is that the goal must be met or the contract will not be awarded, thus turning the goal into a set aside. The WSDOT has imposed these mandatory goals even though it cannot identify any discrimination that has occurred in the Washington highway construction.

The use of race and sex based preferences in circumstances in which there has been no known discrimination violates the equal protection clause. A federal program that encourages, authorizes or requires such preferences is unconstitutional. A state program that uses such preferences when there is no known discrimination is unconstitutional.

VI SUMMARY JUDGMENT: THE STANDARD OF REVIEW

The decision of the District court granting summary judgment is reviewed *de novo*. Viewing the evidence most favorably to the non-moving party, the court must determine whether any genuine issues of material fact exist and whether the District court correctly applied the relevant substantive law. *Oliver v. Keller*, 289 F. 3d. 623, 626 (9th Cir, 2002)

VII ARGUMENT

A. The Program in Question

1. The Transportation Equity Act for the Twenty First Century

The Transportation Equity Act for the Twenty First Century (TEA-21)[2] appropriates federal funds for highway and transportation projects. It is the forth in a series of federal highway funding acts adopted over the last 21 years that allocates a portion of the appropriation for use by disadvantaged businesses.[3] TEA-21 provides "except to the extent the secretary determines otherwise, not less than 10 percent of the amounts available" for highway and transportation projects "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals."[4] The definitions of "small business" and "socially and economically disadvantaged individual" contained in the Small Business Act (SBA), 15 USC § 631, are incorporated.[5]

A business is "small" if it is independently owned and operated, not dominant in it's field of operation, and if the number of employees and receipts are below a specified

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[2] Pub. L. 105-178, 112 Stat. 170

[3] 1982: Surface Transportation Assistance Act (STAA) 96 Stat 2097; 1987: Surface Transportation and Uniform Relocation Assistant Act (STURAA) 101 Stat 145 §106(c); 1991: Intermodal Surface Transportation Efficiency Act (ISTEA) 105 Stat 1919 §1003(b) On September 24, 2003 the house passed an extension of TEA-21; the USDOT has proposed a six year reauthorization SAFETEA: Safe, Accountable, Flexible and Efficient Transportation Equity Act of 2003. The same language is used.

[4] TEA-21 § 1101(b)(1)

[5] TEA-21 § 1101(b)(2)

level. 15 USC § 632(a)(1). "Socially disadvantaged individuals" are as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 USC § 637(a)(6)(a) Five groups, comprising thirty seven subgroups, are presumed to be socially and economically disadvantaged.[6]

To be "economically disadvantaged" a person must have a personal net worth of less than $750,000.00, excluding his or her place of business, personal residence, and the assets of the spouse.[7] Individuals who are not members of the presumptively disadvantaged groups (i.e. white males) may apply and prove DBE disadvantaged status based upon "race, ethnic origin, gender, disability, long term residence in an environment isolated from mainstream society." 49 CFR 26.67; Appendix E

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[6] The groups included are the following: Black Americans; Hispanic Americans; native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian-Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, the Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); and Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal), women. 15 USC § 637(d)(3)(c); 13 CFR 124.103(b) (1998); 49 CFR 26.5

[7] 49 CFR 67(a)(2)(iii), (d); 13 CFR 124, 104(c)(2). A SBA report to Congress in 1995, based on Federal Reserve Board data, showed 92% of American families would qualify under this standard even if the entire family's net worth were included. The Small Bus. Admin's Minority Bus. Development Program, Hearings Before the Senate Cmte on Small Bus, 104 Cong. 42 (1995)

Congress did not provide a comprehensive or detailed method to effect the expenditures upon DBEs. Instead Congress chose to rely upon the regulations that would, but had not been, developed. (ER 75, 86, 96, 273)

2. The Federal Regulations

The Secretary of the United States Department of Transportation determined that the 10% DBE allocation contained in TEA-21 is only an "aspirational goal:"

> This 10% goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring
>
> DBE's opportunities to participate in DOT-assisted contracts.
>
> 49 CFR 26.41(B)

Each recipient of TEA-21 funds must establish a DBE program. 49 CFR 26.21. Each is required to conduct a detailed independent analysis of the local market conditions and set an overall aspirational goal for DBE participation. 49 CFR 26.41; 45. Although the regulations provide suggestions of how to analyze the local conditions, those methods are not mandatory. A recipient may use any method so long as it is based upon "demonstrable evidence of local market conditions." 49 CFR 26.45(c)(5) The USDOT is clear that no particular goal is required, "the national 10% goal does not authorize or require recipients to set overall or contract goals at the 10% level, or any other particular level . . . "49 CFR 26.41(c) This separate, independent, and detailed analysis by each recipient of TEA-21 funds is required to ensure a "narrow tailoring."

49 CFR 26.1. The USDOT will not reject or change a goal proposed by the state (ER 195-196) 49 CFR 26.47(a).

Recipients must meet "the maximum feasible portion of [the] overall goal by using race neutral means . . . " 49 CFR 26.51(a) A "race neutral" measure or method is one that "is or can be used to assist all small businesses." A "race conscious" measure or program is one that is focused specifically on assisting only DBE's, including women owned DBEs. 49 CFR 26.5 Recipients of TEA-21 funds must establish contract goals to meet any portion of the overall goal that cannot be met through race neutral means. 49 CFR 26.51(d) A contract goal, like all goals in the regulation, are only "aspirational." 49 CFR 26.41(b) The use of a "quota" is prohibited in all circumstances. 49 CFR 26.43(a). "Set asides," a practice of restricting eligibility for the award of a contract solely to DBE firms, is restricted to "limited and extreme circumstances" when "no other method could reasonably be expected to redress egregious instances of discrimination." 49 CFR 26.43(a). Recipients cannot use race conscious goals where there is no evidence of discrimination or the present effects of past discrimination. (49 CFR 26.45(d)(3); ER 314) Race conscious goals cannot be used if the recipient has a discrimination free market place. 49 CFR 26.51(f).

3. The State DBE Program

The WSDOT has adopted a DBE plan " . . . to provide equal opportunity to minorities and women in contracting" (ER 337) The program is telling as to the effect of the presumption of social and economic disability. Of the 950 DBEs approved by the state as of October 2000, 99.8% were certified on the basis of a presumption based upon

race and sex. (ER 213) Only two companies were able to obtain certification without the presumption. (ER 217-219)

A yearly goal of 14% was set in 2000 (ER 381), by 2003, the goal had increased to 15%. (ER 230) Neither the DBE plan nor the announcements of the goals use the word "aspirational" to modify the goal. Mandatory contract goals require the prime contractor to meet the specified goal as a "condition of award." (ER 285, 295, 327) The invitation to bid provides "the contracting agency shall consider as non-responsive those bids which . . . display insufficient projected use of DBEs." (ER 278, 281, 285) The WSDOT uses "DBE Utilization Certificate" at the time of the bid which states "insufficient use of DBE's shall be considered as evidence that the proposal is unresponsive." (ER 276, 281, 293) The failure to include the subcontractor list makes the bid "irregular" and it will be rejected. (ER 292)

Although the DBE Participation Plan includes a method which a prime contractor can avoid meeting the goal by showing "good faith efforts" (ER 391) only one contract has ever been awarded based upon good faith efforts. One contractor bid on that contract. (ER 214, 309) Contractors believe the only method by which the WSDOT will award a prime contract is to meet the mandatory goal. (ER 307, 309, 312) No contract document provides a place or method to present good faith efforts.

The WSDOT allocates TEA-21 funds for city and county projects. The local government unit must accept State plan unless it has its plan. (ER 397) When the State plan is used, the WSDOT will impose a mandatory condition of award goal on the city or county project. (ER 323-327)

B. The Constitutional Standards

1. The Equal Protection Clause

The right of all persons to be treated as individuals, rather than merely members of racial groups, has been recognized since ratification of the Fifth Amendment in 1791 and the Fourteenth Amendment in 1868. The Equal Protection Clause of the Fourteenth Amendment protects individuals: "[N]o State shall . . . deny to any **person** within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, § 1 [emphasis added]. Similarly, the Due Process Clause of the Fifth Amendment, into which equal protection principles have been incorporated, protects an individual's right to due process of the law: "No **person** shall be . . . deprived of life, liberty, or property without due process of law." U.S. CONST. Article V. *Schneider v. Rusk*, 377 US 163, 168 (1964) Thus, the right to equal protection of the laws is an individual right, and is guaranteed regardless of an individual's race, sex, or ethnicity. *Adarand Construction v. Pena*, 515 US 200, 224 (1995); *Regents of University of California v. Bakke*, 438 U.S. 265, 289 (Powell, J.) (1978).

The obligations imposed by the Fifth and Fourteenth Amendments are viewed as indistinguishable. *Adarand*, 515 US 200 217, 235; *United States v. Paradise*, 480 U.S. 149, 166 n16 (1987). ("The reach of the Equal Protection Guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment"). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. *Regents of University of California v. Bakke*, 438 US 265, 289-290 (1978) (White & Powell).

2. Racial Classifications are Presumptively Invalid

Racial classifications, including those used to remedy past discrimination, are so harmful that they are presumptively invalid and can be upheld only upon extraordinary justification. *Shaw v. Reno*, 509 US 630, 644 (1993)

3. Racial Classification Requires Strict Scrutiny

To overcome the presumption of invalidity, all racial classifications, whether imposed by federal, state, or local governments must satisfy strict scrutiny. *Adarand*, 515 US at 227. Accordingly, racial classifications are constitutional only if they are "narrowly tailored measures that further compelling government interests." *Adarand*, 515 US at 227.

For the government to demonstrate a compelling interest under strict scrutiny, two conditions must be satisfied. First, "they must identify the discrimination, public or private, with some specificity before they may use race conscious relief. *Shaw v. Hunt*, 517 US 899, 910 (1996). It is not sufficient that the legislature merely express concern about such issues, it must make findings describing the problem's existence and the specific cure it prescribes. To meet this standard, there must be a finding of "constitutional or statutory violations." *City of Richmond v. Croson*, 488 US 469, 497 (1989). This identified discrimination must at least approach a prima facia case of racial discrimination in the local market. *Croson*, 488 at 499-500. Findings of societal discrimination are insufficient. *Wygant v. Jackson Bd of Education*, 476 US 267, 274 (1986); *Shaw*, 517 US at 909-910 ("an effort to alleviate

the effects of societal discrimination is not a compelling interest"). The identified discrimination must show the government actively or passively participated in the discrimination. *Croson*, 488 US at 492. Second, there must be a "strong basis in evidence" to support the conclusion that remedial action was necessary. *Croson*, 488 US at 500; *Shaw*, 517 at 909-910 "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove v. Klutznick*, 448 US 488, 537 (1980) (Stevens, dissenting) The remedy must closely fit the violation. *Millikin v. Bradley*, 433 US 267, 280 (1977) It must be "specifically and narrowly framed to accomplish that purpose." *Shaw*, 517 US at 908.

4. Gender Based Classifications Require "Exceedingly Persuasive Justification"

Classifications based upon gender must be justified by "an exceedingly persuasive justification" and serve "important governmental objectives". The means employed must be "substantially related to the achievement of those objectives. *United States v. Virginia*, 518 US 515, 553 (1996) This test is virtually undistinguishable from strict scrutiny. *Adarand*, 515 US at 224. The justification must be genuine, not hypothesized or invented *post hoc* in response to the lawsuit. *US v. Virginia*, 518 US at 583.

5. The Burden of Justification Is Upon the Government

"In an action challenging the constitutionality of racial and gender classifications the defendant bears the ultimate burden of proving the classifications satisfy strict and intermediate scrutiny respectively." *Scott v. Pasadena*

School District, 306 F. 3d. 646, 655-656 (9th Cir, 2002); *Gratz v. Bollinger*, 539 US ___ (2003) (Slip opinion, p. 21-22) ("To withstand our strict scrutiny analysis, respondents must demonstrate the university's use of race in its current admissions program employs narrowly tailored measures that further compelling government interests."); *Adarand*, 515 US at 224. For laws that classify by sex "the burden of justification is demanding and it rests entirely on the state". *US vs. Virginia*, 518 US at 553.

6. The Court Owes No Deference to Congress

Because racial classifications are presumptively invalid, they are subjected to the strictest judicial scrutiny. "Blind deference to legislative pronouncements of necessity . . . has no place in equal protection analysis." *Croson*, 488 US at 500-01. Neither Congress, nor the state, is entitled to deference in determining whether it has a compelling interest in enacting suspect classifications and that the classification was narrowly tailored in fulfillment of that interest. *Adarand*, 515 US at 218; *Rothe Development Corp v. Dept of Defense*, 263 F. 3d. 1306, 1321 (Fed Cir, 2001)

C. The Federal Program

1. TEA-21 Does Not Establish A Uniform National DBE Program

An analysis must begin with a determination of what Congress actually enacted. The language is inexact: "Except to the extent the secretary determines otherwise, not less than 10% of the amounts available" for highway and transportation projects "shall be expended" with

DBEs. In TEA-21 Congress did not provide a detailed, comprehensive national DBE program that would be uniformly administered. Had it intended to do so the language of TEA-21 would have been simple and direct: "10% of the funds allocated shall be expended with DBEs." The regulations have abandoned the mandatory set asides contained in previous programs. *Milwaukee Pavers*, 922 F. 2d. 419, 422 (7th Cir, 1991)

The secretary of the USDOT did not believe Congress had intended to enact a uniform national DBE program and did not consider the 10% expenditure on DBE's to be mandatory, despite Congress' use of the imperative "shall." The Secretary determined the 10% figure was only an "aspirational goal at the national level" and recognized the "national aspirational goal" does not "authorize or require recipients to set goals at the 10% level or any other particular level." 49 CFR 26.41(a) and (b) Rather than mandating a nationwide DBE participation, the regulations require each recipient to conduct a detailed inquiry of the local market conditions. As a result, the regulations contemplate in excess of fifty separate and distinct programs focused upon the conditions of each local market. The USDOT does not impose goals, or demand changes of goals proposed by the recipient. Instead, the USDOT insures the process used to develop the program is sound and reflects the local market conditions.

For regulations to be valid, they must be consistent with the statute under which they are promulgated. *United States v. Larionoff*, 431 US 864, 873 (1977). It must be assumed the secretary has followed Congress' intent and in doing so understood that Congress did not intend a uniform nationwide policy, but rather one that would respond the to local conditions.

The regulations require the separate, independent, and detailed analysis by each recipient to ensure "narrow tailoring." 49 CFR 26.1 This is a recognition that Congress determined that there was not a single problem or solution. Discrimination and its underlying effects were to be addressed where they exist.

2. TEA-21 Permits The Use Of Preferences Only When Discrimination Is Found Locally

The Supreme Court has made it clear that "racial classifications" cannot withstand strict scrutiny based upon speculation about what "may have motivated the legislature." *Shaw*, 517 US at 908 n4. Unfortunately, Congress is less than clear, there is no express statement of purpose in the statute or committee reports. In fact the committee reports expressly state that Congress abdicated its responsibility of finding compelling interest to the courts. (ER 273) The USDOT relies upon the Congressional hearings (ER 109, 129) and a Justice Department Memo prepared after the enactment of TEA-21. (ER 41)

The USDOT has asserted, and some courts have accepted, that Congress had a compelling interest in eliminating discrimination and its effects in government procurement and spending. *Adarand v. Slater*, 228 F. 3d. 1147, 1167-76 (10th Cir, 2000); *Sherbrook Turf v. Minnesota DOT*, 345 F. 3d. 963, 970 (8th Cir, 2003) There is a compelling government interest in combating such discrimination where it exists.

Although this is a laudable purpose, there must also be a "strong basis in evidence" to support a conclusion that discrimination persisted and remedial action is needed.

Croson, 488 US at 500; *Rothe*, 262 F. 3d. at 1322. Again Congress did not set forth its findings, and the courts must rely upon the congressional hearings. The District Court did not set forth detailed findings as to the scope and content of the reports before Congress. The court did not set forth whatever inference may be drawn as to whether such reports could constitute a strong basis in evidence for remedial action. *Rothe*, 262 F. 3d. at 1323. Generalized assertions of societal discrimination and anecdotal evidence have no probative value. *Croson*, 488 US at 498. Such evidence provides no guidance to the legislative body to determine the scope of the injury it seeks to remedy. *Wygant*, 476 US at 276; *Rothe*, Id.

The evidence before Congress demonstrated a variety of problems, in varying degrees, in different locations, throughout the country. The evidence did not show there was a uniform national problem that could be addressed by a single uniform response. Statistical evidence is particularly important to justify race based legislation. *Croson*, 488 US at 509. There was no nationwide study presented to Congress, rather there were several studies involving different areas of the country. There is no strong basis in evidence to justify a one size fits all solution. There is a strong basis in evidence to find that it is necessary to combat discrimination where it is found to exist.

The regulations crafted by the USDOT provide further support. Congress expressly relied upon the USDOT to develop regulations implementing the law that would survive strict scrutiny. (ER s273) The regulations must be consistent with the statute under which they are implemented to be valid. *Larrinoff*, 431 US at 873. In implementing the regulations the USDOT was apparently mindful of the admonitions of Justice Stevens that "racial

classifications are simply too pervicious to permit any but the most exact connection between justification and classification." 448 US at 537. The USDOT is also aware that the construction industry is a regional industry (See Fed. Reg. 52806, September 30, 1999) and knew that where there is evidence that the problem of discrimination does not exist in all states, then the solution cannot apply to all states. *United States v. Morrision*, 529 US at 598, 625-26 (2000).

The TEA-21 regulations requires attention to the local market conditions. The regulations do not mandate any particular aspirational goal be set or any particular method be used to attain the aspirational goal. The regulations very clearly prohibit quotas, and limit set asides to extraordinary circumstances. The regulations also clearly prohibit the use of race conscious measures in the absence of discrimination. This constitutes clear recognition by Congress and the USDOT that a single nationwide solution cannot satisfy strict scrutiny. The regulations abandoned the mandatory set aside requirements of all recipients contained in the predecessor appropriations of SUTRAA and ISTEA. *Milwaukee Pavers*, 922 F. 2d. at 422.

There is no "strong basis" in evidence to impose a uniform race based action in all parts of the country. A national program must be limited to those parts of the country where race based measures are demonstrably needed. *Sherbrooke*, 345 F. 3d. at 971. The regulations can be constitutional only if they require the state to identify discrimination with specificity before it implements race conscious means. Only then can a program be truly remedial.

D. The State DBE Program

1. Neither The State Nor The Federal Government Could Establish An Independent Program Using Race And Sex Based Preferences

The state can offer no evidence to justify the race and sex based preferences it imposes. Without detailed evidence of prior discrimination the plan would be found to be unconstitutional if the state sought to implement the plan itself. *Monterey Mechanical*, 125 F. 3d. at 713; *Coral Const. Co v. King County*, 941 F. 2d. 910, 920 (9th Cir, 1991) ("any program adopted without some legitimate evidence of discrimination is presumptively invalid")

Similarly, the USDOT could not implement a program in Washington utilizing race based preferences. The federal government has conceded that the "Benchmark Study" alone prohibits the use of race conscious mechanisms for direct federal procurement of highway construction projects in any state other than Alabama, Mississippi, Arkansas, Kentucky, Tennessee, Texas, and Oklahoma. The federal government has also acknowledged in oral argument in *Adarand* that the § 8(d) programs in their current form would not meet the constitutional requirement of "narrow tailoring" if used in jurisdictions where the benchmark study has found no disparity suggesting discrimination or its continuing effects. *Adarand*, 534 US at 111 n2.

It is inconceivable that a program that admittedly cannot survive strict scrutiny if it were to be implemented by the state or federal government alone can somehow survive if implemented together.

2. The State DBE Program Is Not Narrowly Tailored

Even in the limited circumstances in which drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [t]he means chosen to accomplish the [governments] asserted purpose must be specifically and narrowly framed to accomplish this purpose." *Shaw*, 517 US at 908 Such plans must be remedial. The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." Classifications based upon race carry the danger of stigmatic harm. Unless they are strictly reserved for remedial settings they may in fact promote notions of racial inferiority and lead to politics of racial hostility. *Croson*, 488 US at 493; *Bollinger*, 593 US at ___ (Slip Opinion, p. 16)

Six factors are considered in the narrow tailoring analysis: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of wavier provisions; (4) the relationship of the stated numerical goals to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *United States v. Paradise*, 480 US at 149, 171 (1987); *Croson*, 488 US at 506; *Adarand*, 515 US at 238-39 (noting that the lower court on remand should consider whether the legislative body had tried race-neutral alternatives and whether the program was limited in duration). At least four of the six

factors considered in the narrow tailoring analysis cannot be met by the Washington DBE program.

Here "it is almost impossible to assess whether the . . . plan is narrowly tailored to remedy discrimination since it is not linked to identified discrimination in any way." *Croson*, 488 US at 507.

a. Necessity of Relief

Because there is no identified discrimination in the state of Washington highway construction industry, there is no reason to impose the mandatory goals. With no identified discrimination, the DBE plan is not a remedy for anything. It is instead, acting to eliminate societal discrimination or achieve proportionality. Those purposes are inappropriate under *Croson*.

b. The Relationship of the Stated Goals to the Relevant Labor Market

The WSDOT formula determines the availability of DBEs. The WSDOT does make any adjustments to this figure, noting that it simply had a "paucity of information," having conducted no disparity studies and having no information "on employment, self-employed, education, training and union apprenticeship." (ER 321) The process used by the state simply estimates the DBE's who are available to perform work on highway construction projects. The formula does not provide the necessary connection between discrimination and current availability. *Croson*, 488 US at 502. "For statistical evidence to create an inference of discrimination, the statistics must show a significant disparity and eliminate non-discrimination explanation for the disparity; statistical evidence **must**

focus on eliminating non-discriminatory explanations for disparate treatment between comparable individuals." *Fallis v. Kerr McGee Corp*, 944 F. 2d. 743, 746 (10th Cir, 1991) [Emphasis in original]; *Wessman v. Glistens*, 160 F. 3d. 790, 804 (1st Cir, 1998) ("*Croson* . . . reaffirmed the court's longstanding teaching that we must staunchly resist attempts to substitute speculation and correlation for evidence of causation.") The information used by the WSDOT does not show causation.

c. Flexibility of Relief

Even if mandatory condition of award goals were somehow justifiable, which they are not, there is no flexibility. Although the DBE Plan ostensibly allows the award of a contract based upon good faith efforts (ER 391) the undisputed evidence shows that good faith efforts are not available. WSDOT provides good faith:

> means that the bidder must show that it took all necessary and reasonable steps to achieve the DBE goal, and by their scope, intensity, and appropriateness to the objective, the bidder could reasonably be expected to obtain sufficient DBE participation, even if the bidder were not fully successful in meeting the established DBE goal. Mere pro forma efforts are not considered "good faith efforts" to meet the DBE contract requirements
>
> (ER 391)

The WSDOT provides no information to contractors to allow good faith efforts. The bidding documents do not provide a place to identify and submit the good faith

efforts used. There is simply no "specific content" identified as required in *Monterey Mechanical*, 125 F. 3d. at 710.

There has been only one instance in Washington in which a contract was awarded based upon a contractor's showing of good faith efforts. That occurred when no other contractors had bid the job. It is undisputed that contractors believe from experience that the only way in which a bid will be successful is to meet the mandatory goal. There is no flexibility once a mandatory goal is set.

d. Impact Upon the Rights of Third Parties

When there is no known discrimination in the local market and there is no evidence of underutilization of minorities and females, the use of any mandatory goal substantially impacts the rights of others.

e. Overinclusiveness

The WSDOT is unable to identify any discrimination toward Native Americans, Asian Pacific Americans, Black Americans, Hispanic Americans, Subcontinent Asian Americans, or females in Washington. (ER 210-211) Inclusion of groups highly unlikely to have been discriminated against illustrates the undifferentiated nature of the plan. *Wygant*, 476 US at 284 n 13; *Croson*, 488 US at 506; *Monterey Mechanical*, 125 F. 3d. at 714. The inclusion of those who have not suffered discrimination in the local market are "red flags" signaling the program is not narrowly tailored. *Monterey Mechanical*, 125 F. 3d. at 714.

f. The Use Of Race And Sex Based Preferences Is Without End

One of the primary functions of the requirement that governmental identify discrimination with specificity before using preferences is to implement the demand if the Equal Protection Clause "that deviation from the norm of equal treatment of all racial and ethnic groups [be] a temporary matter." *Croson*, 488 US at 510. Government use of racial preferences must be "limited in time" because "racial circumstances, however compelling their goals are potentially so dangerous that they may be employed no more broadly than the interest demands." *Gruitter*, 539 US at ___. (Slip Op. at 30)

If there is no known discrimination to remedy, the use of mandatory goals has lasted too long.

3. The State Cannot Show an Exceedingly Persuasive Justification for Gender Preference

The Sixth Circuit Court of Appeals addressed an analogous situation in *Michigan Road Builders Assn v. Milliken*, 834 F. 2d. 583 (6th Cir, 1987) *aff'd* 489 US 1061. In that case, an action was brought on equal protection grounds challenging a Michigan law setting aside a portion of state contracts for minority and women-owned businesses. The law was overturned both as to minority and women business enterprises. With respect to the preference accorded women-owned businesses, the court stated the law could not withstand constitutional scrutiny since the state had no evidence that it has discriminated against women in the past. The state made general assertions of societal

discrimination which the court decided were insufficient to satisfy its burden. 834 F. 2d. at 595.

In *Mississippi University for Women v. Hogan*, 458 US 718, 724 (1981), the court held that the state could not rely on general assertions of past societal discrimination without evidence that the "members of the gender benefitted by the classification actually suffered a disadvantage related to the classification." 458 US at 728.

Neither the state of Washington nor the USDOT can produced evidence that women, as "members of the gender benefitted" by the gender preference, "actually suffered a disadvantage related to the preference." Therefore, the DBE program is unconstitutional.

4. The State's Misapplication of the Federal Program Establishes "Set Asides"

Although the WSDOT is not aware of any discrimination in the highway construction industry in the state it has and continues to set mandatory condition of awarded goals. The WSDOT admits that no representative of the USDOT informed it that mandatory goals were required. (ER 263, 267, 272) The state underscores the mandatory nature of the goal by bolding the word "mandatory" in correspondence. (ER 327) The WSDOT's practice in awarding contracts shows the mandatory condition of award goal must be met, or the contract will not be awarded.

It doesn't matter what the state calls it, the mandatory condition of award goal is a set aside. Its use is inappropriate, making the Washington DBE plan unconstitutional as applied. *Milwaukee Pavers*, 922 F. 2d. at 424.

("If a state exceeds it's federal authority it would be vulnerable to challenge under *Croson*.")

VIII CONCLUSION

Western States requests the decision of the District court granting summary judgment in favor of the government defendants be set aside. The court should find the WSDOT plan is unconstitutional or alternatively remand for an appropriate analysis under the standards set forth in Rothe Development, supra The State of Washington's use of mandatory goals when it cannot identify discrimination that occurred in the highway construction industry is unconstitutional.

DATED this 21 day of January, 2004.

/s/ Gary E. Lofland
Gary E. Lofland
WSBA# 12150
Attorney for Western
States Paving Co Inc

CERTIFICATE OF COMPLIANCE TO FRAP 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR NO. 00-35412

I certify that:

Pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains about 6,738 words.

Dated this 21 day of January, 2004.

/s/ Gary E. Lofland
Gary E. Lofland
WSBA# 12150
Lofland and Associates
Attorney for Appellee

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32

I, Ginger M. Hansen, declare that:

I prepared this brief using Corel Wordperfect 8.0 for Lofland and Associates, Gary E. Lofland. I certify that I made a good faith effort to comply with FRAP 32 and Circuit Rule 32. I used a propotional,14 point New Times Roman font. I set the top and bottom margins at 1 inch. I set the side margins at 1 inch. I used the Word Count tool to determine that the main body of this brief has about 6,738 words.

I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 21 day of January, 2004.

/s/ Ginger M. Hansen
Ginger M. Hansen
Lofland and Associates

STATEMENT OF RELATED CASES

To the best of Appellant's knowledge, there are no cases currently pending before this court that meets or may meet the definition of related cases under Ninth Circuit Rule 28-2.6.

Dated this 21 day of January, 2004.

/s/ Gary E. Lofland
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THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN STATES PAVING CO. INC., Appellant, vs. **THE WASHINGTON DEPARTMENT OF TRANSPORTATION; DOUGLAS, MACDONALD,** Secretary of the Washington Department of Transportation; and the, **CITY OF VANCOUVER, WASHINGTON; CLARK COUNTY,** Appellee, and **UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF TRANSPORTATION,** and **FEDERAL HIGHWAY ADMINISTRATION** Intervenors-Appellee.	**No.** 03-35783 AFFIDAVIT OF SERVICE

I, Ginger Hansen, declare as follows:

On the 22 day of January, 2004, the undersigned, who is over the age of twenty-one and not a party to this action, served a copy of Appellant's Brief, Excerpts of Record Volume I, and Excerpts of Record Volume II with this Affidavit of Service via first class mail postage prepaid to the addresses below:

E. Bronson Potter
Deputy Prosecutor
Clark County
1013 Franklin
Vancouver, WA 98666-5000

and to:

Steve Dietrich
Assistant Attorney General WSDOT
905 Plum Street, Building 3
Olympia, WA 98504-0113

and to

Alison Chinn
City of Vancouver
210 E. 13th Street
Vancouver, WA 98660

and to

Lisa Stark
US Department of Justice
Civil Rights Division, Appellate Section
950 Pennsylvania Ave, NE, PHB 5016
Washington DC 20530

I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED this 22 day of January, 2004.

/s/ Ginger M. Hansen
Ginger M. Hansen
Legal Assistant

United States Court of Appeals for the Ninth Circuit
Civil Appeals Docketing Statement

Title in Full:

Western States Paving Co Inc.

v.

The Washington Department of Transportation; Douglas MacDonald, Secretary of the Washington Department of Transportation; and the City of Vancouver, Washington; Clark County,

and

United States of America, United States Department of Transportation, and Federal Highway Administration.

Brief Description of Action:

Western States paving company challenged the use of race and sex based preferences in the Transportation Equity Act of the 21st Century and the regulations implemented by the USDOT as violating the Fifth and Fourteenth Amendment to the Constitution. The State of Washington's use of mandatory condition of award and minority and female awards was challenged because there has been no known discrimination in Washington highway construction industry.

Principal Issues:

The constitutionality of the TEA-21 enactment and its implementation by the state of Washington.

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WESTERN STATES PAVING CO., Plaintiff, v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Defendants.	No. C00-5204 (RJB)RBL CLARK COUNTY'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I.

SUMMARY

In its Motion for Summary Judgment, Clark County seeks the dismissal of the plaintiff's claims for money damages based upon alleged violations of 42 USC 1981, 42 USC 1983 and Title VI (42 USC 2000d). The basis for the County's motion is that there is no evidence to support the conclusion that the County's inclusion of Disadvantaged Business Enterprise (DBE) goals in its contract was the result of racial or gender based animus or intentional discrimination. Rather, the undisputed fact is that the DBE goals were included to comply with federal and state requirements relating FHWA funding. The County does not have a DBE policy of its own.

II.

ANALYSIS

The plaintiff admits that "[t]o prevail in an action under §1981, §1983, and 42 USC2000(d), a plaintiff must prove the defendant engaged in intentional or purposeful discrimination".[1]

A. Title VI Claim

The plaintiff fails to cite any case to support an argument that the plaintiff is not required to produce evidence of racial or gender animus or intentional discrimination to support a Title VI claim for monetary damages. In fact, the plaintiff wholly fails to address the motion to dismiss the Title VI claim at all. Rather, the plaintiff's responsive memorandum sets forth an analysis of Title VII employment discrimination cases as they relate to violations of §1981and §1983. As discussed in the County's Memorandum in Support of its Motion for Summary Judgment, "In the absence of proof of discriminatory animus, compensatory relief should not be allowed under Title VI". *Ferguson v. City of Phoenix*, 157 F.3d, 688 (9th Cir. 1998) citing *Guardians Association v. Civil Service Commission of the City of New York*, 643 U.S. 582 (1983). The plaintiff's Title VI claim should be dismissed.

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[1] See Plaintiff's Memorandum in Opposition of City and County Summary Judgment, at p.2

B. 42 USC 1981 and 42 USC 1983 Claims

The plaintiff cites *Adickes v. Kress Co.*, 398 US 144 (1970), *Monterey Mechanical Co. v. Wilson*, 125 F.3d. 702 (9th Cir. 1997), and *Bras v. California Public Utilities Commission*, 59 F.3d, 869 (9th Cir. 1995), in support of the proposition that the County's "I was just following orders" defense has not been accepted by courts.[2] For the reasons stated in the City's Reply Memorandum, and not repeated here, these cases do not apply in the context of a federally mandated program as opposed to state-adopted programs.

The plaintiff apparently believes that *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001) supports the position that it need not produce any evidence of intentional discrimination.[3] However, *Swinton* specifically held that "Section 1981 does require proof of intentional discrimination". The Swinton Court ruled that the trial court did not err in rejecting the defendant's proposed instruction "stating that the plaintiff was required to prove intentional discrimination and 'white employees were not subject to' the same sort of conduct as Swinton." *Swinton* at 806. It should be noted that, in *Swinton*, whether or not the conduct was intentional not even an issue. In ruling that it was not error to fail to include the word "intentional" in the jury instruction, the court stated:

> These cases are not relevant here, where there is no conceivable argument that the harassment perpetrated by Fosdick (and imputed to the employer through the doctrines discussed in Section I, supra) was not, in fact, intentional.

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[2] ibid.at p. ps.3-4.

[3] Ibid. at p. 2.

Swinton at 806. Given that "intentional" discrimination was not an issue in *Swinton*, the court held that the "jury instructions adequately included" the elements required to prove a hostile work environment. *Swinton* at 807. *Swinton* simply does not support the argument that no evidence of intentional discrimination is required to recover monetary damages under either §1981or §1983.

The plaintiff cites a number of employment discrimination cases to argue that the *McDonald-Douglas* burden shifting analysis should apply to the present case. However, the plaintiff also admits that "to prevail under a §1981 claim the plaintiff must prove that race was a 'motivating factor' in the decision".[4] The only evidence that the plaintiff relies upon to establish an impermissible motivating factor is as follows:

> Direct evidence of discriminatory intent is demonstrated by the City and County adopting a policy that gives preferences based upon race and gender.[5]

The plaintiff does not identify what policy it is referring to and has not produced any evidence of the County's adoption of the unspecified policy. In fact, the County does not have a DBE policy.[6] Regardless of whether or not the court employs the *McDonald-Douglas* burden shifting analysis, the County has established that its inclusion of the DBE goal in the contract at issue was not based upon racial or gender based animus. Rather, it was a requirement imposed by the federal government through the state

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[4] ibid. at p. 3

[5] id.

[6] See Declaration of Peter Capell.

in order for the project to qualify for FHWA funding. The plaintiff has failed to meet its burden of establishing an impermissible motivating factor and its §1981and §1983 claims against the County should be dismissed.

C. Federal cases have held that the TEA-21 is constitutional.

The County joins in the City's analysis that the DBE program in question was found to be constitutional by the Tenth Circuit in *Adarand Constructors, Inc. v. Slater*, 228 F.3d. 1147 (10th Cir.2000) Cert. Dismissed 534 U.S. 103 (2001). The federal defendants have addressed the constitutionality of the federal DBE program extensively. The County cannot be liable for monetary damages as a result of complying with constitutional federal requirements. *See Milwaukie County Pavers Association v. Fiedler*, 922 F.2d 419, 423 (7th Cir. 1991).

III.

CONCLUSION

The plaintiff has failed to respond to the County's motion to dismiss its title VI claim. Summary judgment should be entered dismissing the Title VI claim. With respect to all of the plaintiff's claims against the County, the County has established that TEA-21 and WSDOT required the inclusion of the DBE goals. It was not included as the result of racial or gender based animus or intentional discrimination. The plaintiff has failed to produce any evidence to the contrary. Summary judgment should be entered in favor of the County dismissing the claims against it.

Dated this ___ day of July, 2003.

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The Honorable Ronald B. Leighton

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WESTERN STATES PAVING CO. INC., Plaintiff, vs. **THE WASHINGTON DEPARTMENT OF TRANSPORTATION; SID MORRISON,** Secretary of the Washington Department, of Transportation; and the **CITY OF VANCOUVER, WASHINGTON; CLARK COUNTY,** Defendants, and **UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF TRANSPORTATION, AND FEDERAL HIGHWAY ADMINISTRATION,** Interveners.	No. C00-5204 (RJB) RBL DEFENDANT CITY OF VANCOUVER'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR: July 18, 2003

I. DISCUSSION

Defendant City of Vancouver ("City") moved for summary judgment on plaintiff's claims that seek compensatory damages. The basis for the City's motion is that plaintiff's claims for damages against the City are based upon the federal disadvantaged business enterprise ("DBE") program requirements the City was required to include in two federally funded City road improvement projects. Washington State Department of Transportation (WSDOT) imposed these DBE requirements on the City because federal funding was involved and WSDOT was implementing a federal disadvantaged business enterprise program.[1] Plaintiff's case against the City is dependent upon the outcome of plaintiff's challenge to the federal DBE program and federal laws and to the state's implementation of the federal DBE program and federal laws.

A. Cases Cited by Plaintiff Address State Statutes or Programs, Not Federal Laws or Programs.

Plaintiff, in his Memorandum in Opposition of City and County's Summary Judgment, argues that the City's "I was just following orders" defense has not been accepted by the courts.[2] In support of this argument, plaintiff cites *Adickes v. Kress Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970), *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), and *Bras v. California Public*

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[1] Affidavit of Elizabeth Gotelli, ¶ 7.

[2] *See* Plaintiff's Memorandum in Opposition of City and County's Summary Judgment, p. 3-4.

Utilities Commission, 59 F.3d 869 (9th Cir. 1995). All of these cases are distinguishable from the present case.

None of the cases cited by plaintiff dealt with a *federally* enacted program; all of these cases derived from a state statute or state custom or program.

In *Adickes v. Kress Co., supra*, a cause of action arose out of Kress Company's refusal to serve lunch to Adickes and her arrest upon leaving the restaurant. The court held that Adickes could make a claim for violation of her Equal Protection rights if she proved she was refused service because of a state-enforced custom of segregating the races in public restaurants.

In *Monterey Mechanical, supra*, a cause of action arose when the California State University followed a state program setting goals for ethnic and sex characteristics pursuant to state law while awarding a construction contract.

In *Bras v. California PUC, supra*, a cause of action arose when California PUC implemented an Order that specifically directed purchases from outside vendors of not less than 15% for minority owned business enterprises and not less than 5% for women owned business enterprises. This Order was implemented after the California Legislature passed the Women and Minority Business Enterprise Law, which required each utility to annually submit a detailed plan for increasing women, minority, and disabled veteran business enterprise procurement in all categories.

Plaintiff cites cases that discuss state statutes or customs or programs to support his arguments. These cases do not apply in the present situation because there is a difference between the state's power and Congress'

power to remedy racial discrimination. The United States Supreme Court in *Richmond v. Croson*, 488 U.S. 469, 489-91, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989), rejected the argument that a state's power to remedy racial discrimination is equal to that of Congress under § 5 of the Fourteenth Amendment. The court in *Milwaukee County Pavers Assoc. v. Fiedler*, 731 F. Supp. 1395 (W.D. Wisc. 1990), recognized this difference when it considered two different programs – one state-funded and one federally-funded. The court in *Milwaukee County Pavers Assoc.* enjoined the state program and refused to enjoin the federal program. The court in *Milwaukee County Pavers Assoc. v. Fiedler*, 92 F.2d 419, 424 (7th Cir. 1991), stated that,

> [T]he federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. And one way it can do that is by authorizing states to do things that they could not do without federal authorization.

The present case deals with a federally enacted program and statutes, and therefore, cases dealing with federal, not state, statutes and programs are relevant.

B. Federal Cases Have Held that TEA-21 is Constitutional.

All of the cases plaintiff cites in his Memorandum in Opposition of City and County's Summary Judgment, do not address the specific federal program being challenged

in this case, the DBE component of the Transportation Equity Act for the 21st Century (TEA-21).[3]

The Tenth Circuit in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000), *cert. dismissed*, 534 U.S. 103 (2001), has held that the DBE program was constitutional. *See also, Sherbrooke Turf, Inc. v. Minnesota Department of Transportation et. al.*, 2001 U.S. Dist. LEXIS 19565, 2001 WL 1502841 (D. Minn.) (copy attached) (cited in *Builders Association of Greater Chicago v. City of Chicago*, 240 F. Supp. 2d 796, 799 (N.D. Ill. 2002)).

The Federal Defendants' Motion for Summary Judgment addresses the constitutionality of the federal DBE program and federal laws in more detail.

C. The City's Required Adoption of Federal DBE Requirements is Not Direct Evidence of Discriminatory Intent by the City.

Plaintiff, in his Memorandum in Opposition of City and County's Summary Judgment, argues that, "[d]irect evidence of discriminatory intent is demonstrated by the City and County adopting a policy that gives preferences based upon race and gender."[4] Plaintiff's claims relate to alleged discrimination due to the inclusion of DBE requirements in two City contracts, which was required by WSDOT in implementing the federally mandated DBE

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[3] Plaintiff's Memorandum in Opposition of City and County's Summary Judgment, p. 2-3.

[4] Plaintiff's Memorandum in Opposition of City and County's Summary Judgment, p. 3.

program.[6] The City of Vancouver was required to include these DBE requirements as a condition of receiving funding.[6] The City of Vancouver does not have a DBE or other set aside program of its own for public works projects.[7]

Plaintiff's argument assumes that the federal DBE program and federal laws and the state's implementation of that program and those laws are unconstitutional or unlawful. Plaintiff is unable to show this. (The Federal Defendants' Motion for Summary Judgment addresses the constitutionality of the federal statutes and program. The State Defendants' Motion for Summary Judgment addresses the state actions while implementing the federal program.) The ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of an affirmative action program. *Adarand Constructors, Inc. v. Slater*, 228 F.3d at 1176 (citations omitted). The challenger continues to bear the ultimate burden of persuading the court that the government entity's evidence did not support an inference of prior discrimination and thus a remedial purpose. *Id.* Plaintiff has failed to meet its burden.

1. Local implementation of a constitutional federal program is constitutional.

If the state does exactly what the federal statute expects it to do, and the statute is constitutional, the state cannot be held to have violated the Constitution. *See*

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[6] Plaintiff's Amended Complaint ¶¶ 8-27.

[6] Affidavit of Elizabeth Gotelli, ¶ 7.

[7] Affidavit of Elizabeth Gotelli, ¶ 7.

Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419, 423 (7th Cir. 1991). In the present case, plaintiff challenges the state's role in a DBE program that has been determined to be constitutional. Because the state and City have done what the federal statute required them to do while implementing the constitutional DBE program, the state and City cannot be held to have violated the Constitution. To hold otherwise would "hamstring the federal program". *Supra*, at p. 424. "[T]he federal regulations explicitly permit the state or other entity receiving the grant to apply the presumption without investigating the situation of particular applicants." *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419, 424 (7th Cir. 1991). Thus, states that establish DBE programs under TEA-21 and Part 26 of its regulations need not independently prove its DBE program meets the strict scrutiny standard. Therefore, the City's required adoption of federal DBE requirements is not direct evidence of discriminatory intent or illegal conduct by the City. And, the City is not liable under Wash. Rev. Code § 49.60.400 because its adoption of the DBE requirements was required to establish or maintain eligibility for federal funding. (State Defendants have discussed this in more detail in their Motion for Summary Judgment.)

II. CONCLUSION

The City cannot be liable under federal civil rights statutes or state law for adopting federal DBE requirements in order to establish or maintain eligibility for federal highway funding. Based upon the foregoing, the City requests that its motion for summary judgment be granted, and the plaintiff's Complaint be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 16th day of July, 2003.

/s/ Alison J. Chinn
Alison J. Chinn, WSBA #12602
Assistant City Attorney
Attorney for Defendant
City of Vancouver

GARY E. LOFLAND
LOFLAND & ASSOCIATES
9 North 11th Avenue
Yakima, WA 98902
PHONE: (509) 452-2828
Attorney for Plaintiff

Judge Ronald Lighton

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WESTERN STATES PAVING CO. INC.,

Plaintiff,

vs.

THE WASHINGTON DEPARTMENT OF TRANSPORTATION; DOUGLAS, MACDONALD, Secretary of the Washington Department of Transportation; and the, **CITY OF VANCOUVER, WASHINGTON; CLARK COUNTY,**

Defendants,

and

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF TRANSPORTATION, and **FEDERAL HIGHWAY ADMINISTRATION**

Intervenors.

No. C00-5204-RBL

PLAINTIFF'S MEMORANDUM IN OPPOSITION OF CITY AND COUNTY'S SUMMARY JUDGMENT

I INTRODUCTION

Clark County and the City of Vancouver move for summary judgment on the plaintiff's claims which seek compensatory damages under 42 USC § 1981, § 1983, and 42 USC § 2000(d).

Both the City and County defendants claim that the proof of intentional discrimination necessary to sustain a claim for compensatory damages cannot be shown because the use of race and gender based preferences resulted from the mandatory contract goals imposed by the WSDOT as a condition of receiving state funds.

II LEGAL REQUIREMENTS

42 USC § 1981 prohibits race discrimination in making and enforcing contracts. 42 USC § 1983 provides remedies against state actors who deprive a party of rights guaranteed by the constitution or federal statute. 42 USC § 2000(d) prohibits discrimination in federally assisted programs. To prevail in an action under § 1981, § 1983, and 42 USC 2000(d) a plaintiff must prove the defendant engaged in intentional or purposeful discrimination. *Swinton v. Potomac Corp*, 270 F. 3d. 794, 806 (9th Cir, 2001)

In *Swinton* the court recognized that discrimination not based on a disparate impact theory, is in fact, intentional discrimination:

> The 1991 [Civil Rights] Act limits compensatory and punitive damage awards . . . to cases of intentional discrimination – that is, cases that do not rely on the "disparate impact theory of discrimination."

Swinton, 270 F. 3d. at 806-07;
Citing: *Kolstar v. Am Dental Assn*,
527 US 526, 534 (1999)

In *Swinton* the court rejected the argument that the jury is required to be instructed that it must find "intentional discrimination." 270 F. 3d. at 806.

The essence of an intentional discrimination or disparate treatment claim is different treatment. In *Teamsters v. United States*, the Supreme Court wrote:

> Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fats of differences in treatment.
>
> 431 US 324, 355 n. 15 (1977)

In disparate treatment case the central question is always whether the defendants actions were motivated by discriminatory intent.

The *McDonald-Douglas* burden shifting analysis developed in Title VII disparate treatment cases is applied to cases brought under § 1981. *Diefenback v. Walmart Stores*, 156 F. 3d. 581, 587 (5th Cir, 1998); *Kim v. Nash Finch Co*, 123 F. 3d. 1046, 1055 (8th Cir, 1997); *Bration v. Roadway Package*, 77 F. 3d. 168, 175-76 (7th Cir, 1996). It also applies to § 1983 claims. *Causey v. Balog*, 162 F. 3d. 865, 872 (4th Cir, 1998); *Adrington v. Cobb Court*, 139 F. 3d. 865, 872 (11th Cir, 1998).

To prevail under a § 1981 claim the plaintiff must prove that race was a "motivating factor" in the decision. The same "motivating factor" burden is applicable to Title VII and § 1981. *Anderson v. Douglas and Lomason*, 26 F. 3d. 1277, 1287 n.7 (9th Cir, 1994); *London v. Coopers and Lybrand*, 644 F. 2d 811 (9th Cir, 1981) (Rights under § 1981 and Title VII coextensive) The Ninth Circuit holds that a violation is made out as soon as an impermissible motivation played a part in a decision. *Fadhal v. City and County of San Francisco*, 741 F. 2d. 1163, 1165-66 (1984)

The Civil Rights Act of 1991 clarified the extent to which an improper motive may be the basis for liability when a defendant's action are based upon both lawful and unlawful motives. The Act rendered such cases as triable by a jury on the issue of compensable and punitive damages. 42 USC § 1981 (a)(c) A defendant is liable if it is shown that the discrimination was a "motivating factor" in the challenged decision or action "even though other factors also motivated the challenged action or decision or action and regardless of whether the case is one of "pretext" or "mixed motives." 42 USC § 2000(e)-2(m)

Direct evidence of discriminatory intent is demonstrated by the City and County adopting a policy that gives preferences based upon race and gender.

A defendant's claim that they can not be held responsible because they were simply following an imposed policy has not been well received. In *Adickes v. Kress Co*, 398 US 144 the Court reversed to allow a § 1983 claim to proceed against a private actor who relied upon a state enforced custom requiring racial discrimination. 398 US at 148. Likewise this Circuit recognized that a private actor may be subject to § 1983 liability for discriminating against

persons based upon their ethnicity or sex pursuant to a state law requiring it. *Monterey Mechanical*, 125 F. 3d. 702, 708 (9th Cir, 1997). In *Baas v. California Utility Commission*, 59 F. 3d. 869 (9th Cir, 1995) the plaintiff brought a § 1983 claim for damages against Pacific Bell for discriminating against the plaintiff in the course of complying with a state statutory schedule to increase minority and women in utility contracting. "I was just following orders" defense has not been accepted.

The use of the race and sex based preferences by the city and county which necessitated prime contractors coerced compliance is sufficient evidence to overcome the summary proceeding.

III CONCLUSION

The motion should be denied.

DATED this 7 day of July, 2003.

/s/ Gary E. Lofland
Gary E. Lofland WSBA# 12150
LOFLAND AND ASSOCIATES
Attorney for Western States Paving

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WESTERN STATES PAVING CO., Plaintiff, v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Defendants.	No. C00-5204(RJB)RBL CLARK COUNTY'S MOTION FOR SUMMARY JUDGMENT AND ARGUMENT IN SUPPORT THEREOF NOTE FOR CONSIDERATION: July 11, 2003

I. MOTION

COMES NOW the defendant, Clark County, Washington, by and through its attorney of record, E. Bronson Potter, and moves the Court for the entry of an order dismissing the plaintiff's claims for compensatory damages against Clark County that are based upon 42 U.S.C. 1981, 42 U.S.C. 1983 and 42 U.S.C. 2000d. This motion is based upon the declaration of Pete Capell, the subjoined argument and the files and records herein.

II. ARGUMENT

A. SUMMARY

In this action, the plaintiff seeks various remedies. It requests declaratory judgment invalidating race and sex

base preferences used in the award of public work contacts.[1] It seeks injunctive relief.[2] It also seeks monetary damages based upon alleged violations of 42 U.S.C. 1981, 42 U.S.C. 1983 and 42 U.S.C. 2000d.[3]

Clark County's Motion for Summary Judgment seeks dismissal of the plaintiff's claims for monetary damages against it based upon 42 U.S.C. 1981, 42 U.S.C. 1983 and 42 U.S.C. 2000d. The basis for the county's motion is that there is no evidence to support the conclusion that the county's inclusion of disadvantaged business enterprise ("DBE") goals in its contract was the result of racial or gender based animus or intentional discrimination.

B. DISCUSSION

Congress established a DBE program through the enactment of a series of statutes which authorize the appropriation of federal funds for transportation projects throughout the country. *See* Transportation Equity Act for the 21st Century (TEA-21), Intermodal Service Transportation Efficient Act of 1991 (ISTEA) and Surface Transportation and Uniform Relocation Assistance Act of 1987. The plaintiff's amended complaint challenges Sec. 1101(b) of TEA-21 and the federal regulations that implement it. The regulations are found at 49 CFR part 26. Pursuant to these regulations, the Washington Department of Transportation ("WSDOT") and other direct recipients of TEA-21 funds are required to establish an approved DBE program. WSDOT issued its "Disadvantaged Business

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[1] See Plaintiff's First Claim in its Amended Complaint.

[2] See Plaintiff's 5th Claim in its Amended Complaint.

[3] See Second Claim of Plaintiff's Amended Complaint.

Enterprise Program: Participation Plan" in response to 49 CFR part 26.4[4] Section XI of the WSDOT DBE Participation Plan requires contracts on projects receiving FHWA funding to include a provision that the contractor "shall carry out the applicable requirements of 49 CFR part 26".

The plaintiff's claim for damages against Clark County is based upon the DBE requirements included in the county's contract awarded to the prime contractor on the Padden Parkway (East Leg) Project. The DBE requirement for the Padden Parkway (East Leg) Project was a fourteen percent DBE goal imposed by WSDOT in its letter dated June 22, 2000.[5] Clark County does not have a DBE or other set aside program of its own for public works.[6]

The issue raised by the County's Motion for Summary Judgment is under what circumstances may a plaintiff recover monetary damages for violations of the Fifth or Fourteenth Amendments or Title VI of the Civil Rights Act of 1964. For the reasons that follow, the county contends that monetary damages are only recoverable when the plaintiff establishes that the defendant acted with a discriminatory intent. Absent the production of competent evidence that Clark County acted in an intentional discriminatory manner, Clark County is entitled to summary judgment dismissing the 42 U.S.C. 1981, 42 U.S.C. 1983 and 42 U.S.C. 2000(d) damage claims against it. *Celotex v. Catrett,* U.S 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986).

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[4] See Exhibit 8 to Plaintiff's Memorandum in Opposition to Motion to Dismiss.

[5] See Exhibit A to Declaration of Mr. Pete Capell

[6] See Declaration of Pete Capell.

1. TITLE VI CLAIM (42 USC 2000d)

The Supreme Court established in *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582, 584, 77 L.Ed. 2nd 866, 103 S.Ct. 3221 (1983), and more recently confirmed in *Alexander v. Sandoval*, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed. 2d 517 (2001), that plaintiffs cannot recover compensatory damages under Title VI unless they prove intentional discrimination. As stated in *Ferguson v. City of Phoenix*, 157 Fd. 3d 688 (9th Cir. 1998) "from *Guardians* comes the majority message that in the absence of proof of discriminatory animus, compensatory relief should not be allowed under Title VI."

Justice White made it clear in *Guardians* that while a plaintiff may be entitled to declaratory or injunctive relief under 42 U.S.C. 2000d absent a showing of discriminatory animus, compensatory damages are not available. He stated:

> The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI of the Civil Rights Act of 1964, 78 stat. 252, as amended, 42 U.S.C. 2000(d) et seq and administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent, however, I conclude that judgment below should be affirmed on other grounds, because, in the absence of proof of discriminatory animus, compensatory relief should not be awarded to private Title VI plaintiffs; unless discriminatory intent is shown, declaratory and limited injunctive

> relief should be the only available private remedies for Title VI violations.
>
> 463 U.S. at 584.

2. 42 U.S.C. 1981 and 42 U.S.C. 1983 CLAIMS

Proof of discriminatory intent is also required to recover damages under either 42 U.S.C. 1981 or 42 U.S.C. (1983). In *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 2nd 597 (1976), the Court held that claims of racial discrimination brought under 42 U.S.C. 1981 cannot rest solely on racially disproportionate impact, but rather, must be premised upon proof of a discriminatory motive or purpose. *See also General Building Contractors v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed. 2d. 835 (1982). This requirement was recognized in the Ninth Circuit in *Officers for Justice v. Civil Service Commission of San Francisco*, 688 F.2d 615 (1982).

In *Personal Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed. 2nd 870 (1979) the Supreme Court held that proof of intentional discrimination is a requirement to recover for alleged equal protection violations under 42 U.S.C. 1983. As the Court explained:

> Discriminatory purpose, "however implies more than intent as volition or intent as awareness of consequences". *See United States v. Carey*, 430 U.S. 144, 179 (concurring opinion) it implies that the decision maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," and not merely "in spite of," its adverse affects upon the identifiable group. . . . proof of discriminatory intent must necessary usually rely on objective factors several

> which were outlined in *Arlington Heights v. Metropolitan Housing Dev.Corp.*, 429 U.S. 252 266.

60 L.Ed. 2nd at 888.

The requirement proving discriminatory intent in order to recover damages under 42 U.S.C. 1983 was recognized by the Ninth Circuit in *Chavez v. Tempe Union High School Dist.*, 565 F.2d 1087 (9th Cir. 1977). In that case, the Court stated: "Because Section 1983 incorporates by reference the terms of the Constitution itself, it appears that an action under this statute, at least to the extent that it relies upon the Equal Protection Clause of the Fourteenth Amendment requires proof not only of discriminatory impact, but also of discriminatory intent as established by the Supreme Court in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 597 (1976)." *Chavez* at 1095. The necessity of establishing discriminatory intent to recover under Section 1983 was again confirmed by the Ninth Circuit in *Ferguson v. City of Phoenix*, 157 F.3d. 669 (9th Cir., 1998).

To prove intentional discrimination, one must show that "a challenged action was motivated by an intent to discriminate." *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1406 (11th Cir.,1993). This requires proof that the defendant was not only aware of the plaintiff's race, but also acted, at least in part, because of the plaintiff's race. *Elston* at 1406. As stated in *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996):

> In order to establish liability under Section 1983, Nabozny must show that the defendants acted with a nefarious discriminatory purpose (citing *Feeney* 442 U.S. at 279) and discriminated against him based upon his membership in a definable

> class. (Internal citizens omitted) As we explained in *Shango v. Jurich*, 681 F.2d 1091 (7th Cir. 1982):
>
> The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action. A plaintiff must demonstrate intentional or purposeful discrimination to show an equal protection violation. Discriminatory purpose, however implies more than intent as volition or intent as awareness of consequences. It implied that a decision maker signaled out a particular group for disparate treatment and his selected course of action at least in part for the purpose of causing its adverse effects upon the identifiable group.

Nabozny at 453-454.

C. CONCLUSION

The DBE program that the plaintiff complains of is not a program or policy created by Clark County. Rather, it is a federal program that WSDOT, in Washington, imposes upon local jurisdictions when WSDOT distributes FHWA funding. Clark County included the DBE requirements at issue as required by WSDOT. Clark County does not have a DBE policy or program of its own. Clark County's inclusion of the DBE goals complained of was not the result of discriminatory animus. It was not the result of intentional discrimination. Rather, it was done to comply with federal and state requirements relating to FHWA funding. Clark County's Motion to Dismiss the plaintiff's damage claims under 42 U.S.C. 1981, 42 U.S.C. 1983 and 42 U.S.C. 2000d should be granted.

Dated this 5th day of June, 2003.

/s/ E. Bronson Potter
E. Bronson Potter, WSBA #9102
Senior Deputy Prosecuting Attorney

I, Helen J. Johnson, hereby certify that on this 6th day of June 2003, I deposited with Federal Express Overnight Delivery, postage prepaid, a true and correct copy of the foregoing Clark County's Motion for Summary Judgment and Argument in Support Thereof directed to each attorney-of-record in the above-entitled action:

Chuck Leggott
U.S. Department of Justice
950 Constitution Avenue N.W.
Employment Litigation Section
Patrick Henry Building Room 4912
Washington DC 20030

Gary E. Lofland
Lofland and Associates
9 North 11th Avenue
Yakiima, Washington 98902

Steve Dietrich
Assistant Attorney General
Post Office Box 40113
Olympia, Wa. 98504-0113

A copy of the above-mentioned document was delivered to the office of Alison J. Chinn, Assistant City Attorney, City of Vancouver on the 6th day of June, 2003.

/s/ Helen J. Johnson

The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WESTERN STATES PAVING CO., Plaintiff, v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Defendants.	No. C00-5204(RJB)RBL DECLARATION OF PETE CAPPELL

1. I am the Director of Public Works for Clark County, Washington.

2. In 2000, Clark County issued a request for proposals for a county road project known as the Padden Parkway (East Leg). This project involved the construction of two miles of a four-lane county road and a median. This project was substantially funded by Federal Highway Administration (FHWA) funds.

   In Washington, the distribution of FHWA funding is distributed and administered by the Washington State Department of Transportation (WSDOT). In connection with the Padden Parkway (East Leg), WSDOT issued a letter addressed to me imposing a "fourteen percent mandatory DBE goal for this project." A true and correct copy of this letter is attached hereto as Exhibit A.

   Clark County does not have any disadvantaged business enterprise program or affirmative action program of its own that is related to the awarding of

public contracts. The only reason a DBE goal was utilized in the Padden Parkway (East Leg) contract is that it was a requirement imposed by WSDOT as a condition of the distribution of the FHWA funding.

Pete Cappell
Director of Public Works

I, Helen J. Johnson, hereby certify that on this ___ day of November, 2005, I deposited with Federal Express in overnight mail, postage prepaid, a true and correct copy of the foregoing Declaration of Pete Cappel directed to each attorney-of-record in the above-entitled action:

Chuck Leggott
U.S. Department of Justice
950 Constitution Avenue N.W.
Employment Litigation Section
Patrick Henry Building Room 4912
Washington DC 20030

Gary E. Lofland
Lofland and Associates
9 North 11th Avenue
Yakima, Washington 98902

Steve Dietrich
Assistant Attorney General
1125 Washington Street S.E.
Post Office Box 40113
Olympia, Wa. 98504-0113

A copy of the Declaration of Pete Cappel was delivered to the office of Alison J. Chinn, Assistant City Attorney on the 6th day of June, 2003.

ALISON J. CHINN
Assistant City Attorney
City of Vancouver
PO Box 1995
Vancouver, WA 98668-1995
(360) 696-8251
Attorney for Defendant City of Vancouver

The Honorable Ronald B. Leighton

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WESTERN STATES PAVING CO. INC.,

Plaintiff,

vs.

THE WASHINGTON DEPARTMENT OF TRANSPORTATION; SID MORRISON, Secretary of the Washington Department, of Transportation; and the **CITY OF VANCOUVER, WASHINGTON; CLARK COUNTY,**

Defendants,

and

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF TRANSPORTATION, AND FEDERAL HIGHWAY ADMINISTRATION,

Interveners.

No. C00-5204 (RJB) RBL

DEFENDANT CITY OF VANCOUVER'S MOTION FOR SUMMARY JUDGMENT AND ARGUMENT IN SUPPORT THEREOF

NOTE ON MOTION CALENDAR:
July 11, 2003

I. MOTION

COMES NOW the defendant, City of Vancouver, Washington, by and through its attorney of record, Alison J. Chinn, and moves the Court for the entry of an order dismissing the plaintiff's claims for compensatory damages against City of Vancouver that are based upon 42 U.S.C. 1981, 42 U.S.C. 1983, and 42 U.S.C. 2000d. This motion is based upon the affidavit of Elizabeth Gotelli, this argument and the files and records herein.

II. ARGUMENT

The City of Vancouver joins in Clark County's Motion for Summary Judgment. For the purposes of this Motion, the City adopts the arguments set forth in A. Summary and B. Discussion of Clark County's Motion and Summary Judgment and Argument in Support Thereof as if fully set forth herein. The City of Vancouver also adds the following:

A. SUMMARY

City of Vancouver's Motion for Summary Judgment seeks dismissal of the plaintiff's claims for monetary damages against it based upon 42 U.S.C. 1981, 42 U.S.C. 1983, and 42 U.S.C. 2000d. The basis for the City's motion is that there is no evidence to support the conclusion that the City's inclusion of the disadvantaged business enterprise ("DBE") goals in its contract was the result of racial or gender based animus or intentional discrimination.

B. DISCUSSION

Plaintiff's claims for damages against the City of Vancouver is based upon the DBE requirements included in the City's contracts on two road improvement projects – the Mill Plain Project and the NE Burton Road Project. The DBE requirement for the Mill Plain Project was a sixteen percent (16%) DBE goal imposed by Washington State Department of Transportation (WSDOT) in its letter dated October 5, 1998. (See, Exhibit A to Affidavit of Elizabeth Gotelli.) The DBE requirement for the NE Burton Road Project was a fourteen percent (14%) DBE goal imposed by WSDOT in its letter dated June 20, 2000. (See, Exhibit B to Affidavit of Elizabeth Gotelli.) The City of Vancouver does not have a DBE or other set aside program of its own for public works projects. (See Affidavit of Elizabeth Gotelli.) The only reason DBE goals were utilized in the Mill Plain and NE Burton Road Projects is that it was a requirement imposed by WSDOT as a condition of the distribution of the FHWA funding. (*Id.*)

C. CONCLUSION

The DBE program that is the focus of this lawsuit is not a program or policy created by the City of Vancouver. The DBE program is a federal program that WSDOT, in Washington, imposes upon local jurisdictions when WSDOT distributes Federal Highway Administration (FHWA) funding. The City of Vancouver was required by WSDOT to include the DBE requirements at issue. The City of Vancouver does not have its own DBE policy or program. There was no discriminatory animus on the part of the City. There is no evidence that the City acted in an intentional discriminatory manner. The City was required

to comply with federal and state requirements relating to FHWA funding.

The City of Vancouver's Motion to Dismiss plaintiff's damage claims under 42 U.S.C. 1981, 42 U.S.C. 1983, and 42 U.S.C. 2000d should be granted.

RESPECTFULLY SUBMITTED this 9th day of June, 2003.

/s/ Alison J. Chinn
Alison J. Chinn, WSBA#12602
Assistant City Attorney
Attorney for Defendant
City of Vancouver

ALISON J. CHINN
Assistant City Attorney
City of Vancouver
PO Box 1995
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Attorney for Defendant
City of Vancouver

The Honorable
Ronald B. Leighton

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WESTERN STATES PAVING CO. INC., Plaintiff, vs. **THE WASHINGTON DEPARTMENT OF TRANSPORTATION; SID MORRISON,** Secretary of the Washington Department, of Transportation; and the **CITY OF VANCOUVER, WASHINGTON; CLARK COUNTY,** Defendants, and **UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF TRANSPORTATION, AND FEDERAL HIGHWAY ADMINISTRATION,** Interveners.	No. C00-5204 (RJB) RBL AFFIDAVIT OF ELIZABETH GOTELLI IN SUPPORT OF THE CITY OF VANCOUVER'S MOTION FOR SUMMARY JUDGMENT

STATE OF WASHINGTON)
) ss.
County of Clark)

I, Elizabeth Gotelli, being first duly sworn, depose and say that:

1. I am over the age of eighteen years and competent to testify as a witness herein.

2. I am currently the City of Vancouver's Procurement and Contracts Manager. As such, I am responsible for contracting services within the City of Vancouver, including road improvement projects within the City.

3. In March 1999, the City of Vancouver, Washington sought bids for a project that was titled "Mill Plain Boulevard Extension – Urban Improvement segment from Lincoln Avenue to Columbia Street (TA-0653)", hereinafter "Mill Plain Project". The Mill Plain Project involved the construction of 2.11 miles of a four lane city road with left turn pockets. This project was substantially funded by Federal Highway Administration (FHWA) funds.

4. In Washington, the distribution of FHWA funding is distributed and administered by the Washington State Department of Transportation (WSDOT). In connection with the Mill Plain Project, WSDOT issued a letter to the City imposing a 16% DBE goal. A true and correct copy of that letter is attached hereto as Exhibit A.

5. In July 2000, the City of Vancouver sought bids for a project that was titled "Street Widening and Realignment NE 25th Street/NE Burton Road Andresen Road to NE 86th Avenue and N. Burton road/NE 18th Street (TA-0443)", hereinafter "NE Burton Road Project".

The NE Burton Road Project involved the construction of .75 miles of a 3 lane city road with center left turn and bike lanes. This project was substantially funded by Federal Highway Administration (FHWA) funds.

6. In connection with the NE Burton Road Project, WSDOT issued a letter to the City imposing a 14% DBE goal. A true and correct copy of that letter is attached hereto as Exhibit B.

7. The City of Vancouver does not have its own Disadvantaged Business Enterprise program or requirement related to the awarding of its contracts. The only reason DBE goals were utilized in the Mill Plain Project and the NE Burton Road Project is that it was a requirement imposed by WSDOT as a condition of the distribution of the FHWA funding.

Dated this 9th day of June, 2003.

/s/ Elizabeth Gotelli
ELIZABETH GOTELLI

SUBSCRIBED AND SWORN to before me this 9 day of June, 2003.

/s/ Amy Heath
Signature of Notary Public

[SEAL]

Title: NOTARY PUBLIC

My Commission Expires:
4/25/06

GARY E. LOFLAND
LOFLAND & ASSOCIATES
9 North 11th Avenue
Yakima, WA 98902
PHONE: (509) 452-2828
Attorney for Plaintiff

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WESTERN STATES PAVING CO. INC., Plaintiff, vs. **THE WASHINGTON DEPARTMENT OF TRANSPORTATION; SID MORRISON**, Secretary of the Washington Department, of Transportation; and the **CITY OF VANCOUVER, WASHINGTON; CLARK COUNTY,** Defendants, and **UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF TRANSPORTATION,** and **FEDERAL HIGHWAY ADMINISTRATION** Interveners.	**No.** C00-5204-RJB AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF AND DAMAGES (Filed Nov. 15, 2000)

COMES NOW the plaintiff, Western Statez Paving Co. Inc., and for its complaint against the defendants, alleges as follows:

I. PARTIES

1. The plaintiff, Western States Paving Co. Inc., ("Western"), is a corporation organized under the laws of the State of Washington. It's offices are located in Vancouver, Washington. Western is an asphalt and paving contractor. It performs such work for public contracts including those of the Washington State Department of Transportation and City of Vancouver. It's principle place of business and operation is Vancouver county in Washington.

2. The Department of Transportation (WSDOT) is an administrative agency of the State of Washington. It is responsible for the construction and maintenance of highways.

3. The Defendant, Sid Morrison is the Secretary of the Washington State Department of Transportation. Defendant Morrison is sued in his official capacity.

4. The City of Vancouver Washington is a political subdivision of the State of Washington.

5. Clark County is a political subdivision of the state of Washington.

II. JURISDICTION AND VENUE

6. This action arises out of the requirements, contracts, laws, and regulations of the City of Vancouver, Clark County, and State of Washington and brought to

secure the rights of Western States Paving Co. Inc. as guaranteed by the due process and Equal Protection Provisions of the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act, 42 USC § 2000(d)(7); 42 USC § 1981 and § 1983; RCW 49.60 and Proposition 200. Western seeks damages, declaratory, and injunctive relief pursuant to 28 USC §2201 and §2202. Jurisdiction in this court is properly invoked pursuant to 28 USC § 1331 and § 1343.

7. Venue is proper under 28 USC 1391 (b) in that the contracts and work which give rise to this cause of action occurred in the State of Washington. Western is a resident of the state of Washington.

III. FACTUAL BACKGROUND

8. The State of Washington through the WSDOT receives and administer funds for the construction and repair of state roads and highways, portions of those funds are disbursed by the WSDOT to city and county government units for local road construction and repair.

9. The WSDOT has implemented and enforced the requirement that a specified percentage of the total contract be awarded to 'disadvantaged business enterprises' (DBE).

10. The DBE requirements implemented by the WSDOT must be followed and enforced by the local government units to which funds are distributed.

11. In March 1999, the City of Vancouver Washington sought bids for a project that was titled 'Mill Plain Boulevard Extension – Urban Improvement segment from Lincoln Avenue to Columbia Street (TA-0653).

12. The specifications for the Mill Plain contract required bidders allocate 16% of the total contract amount for DBE participation.

13. Western States Paving Co. Inc. sought to perform subcontracts on the Mill Plain projects and submitted bids.

14. The subcontract was awarded to a DBE despite Western States Paving Co. Inc. having submitted a bid that was $75,000.00 less than the DBE.

15. In July 2000 the City of Vancouver Washington sought bids for a project that was titled 'Street Widening and Realignment NE 25th Street/NE Burton Road Andresen Road to NE 86th Avenue and N. Burton Road/NE 18th Street (TA-0443)'.

16. The specifications for the project required bidders allocate 14% of the total contract price to DBE contractors.

17. Western States sought to perform subcontracts on the 'NE 25th Street/NE Burton Road' project and submitted bids.

18. The subcontract was awarded to a DBE despite Western States having submitted a bid that was $25,000.00 less than the DBE.

19. In August 2000, Clark County sought bids for a project that was titled 'Parren Parkway East-NE 117th Ave to Ward Ave' federal aid project no. STPF-4380(001) TA-1418.

20. The specifications for the 'Parren Parkway East' project required bidders allocate 14% of total contract price to DBE contractors.

21. Western States sought to perform subcontractors on the Parren Parkway East' project and submitted bids.

22. The subcontract was awarded to a DBE despite Western States having submitted a bid that was more than $100,000.00 less than the DBE.

23. The requirements established and enforced by the WSDOT, City of Vancouver, and Clark County impose utilization goals and preferences based upon race, national origin, and sex.

24. The requirements established and enforced by the WSDOT, City of Vancouver, and Clark County require contractors to make decisions based upon race, national origin, and sex.

25. The WSDOT continues to impose and enforce requirements of DBE utilization in contracts.

26. The City of Vancouver continues to impose and enforce requirements of DBE utilization in contracts.

27. Clark County continues to impose and enforce requirements of DBE utilization in contracts.

28. Western has and will continue to bid on such contracts as both a general and subcontractor.

29. Western has submitted claims to the State of Washington and City of Vancouver under RCW (Exhibit A and B).

IV FIRST CLAIM - DECLARATORY RELIEF

30. The defendants establishment and enforcement of requirements that contractors use race and sex based preferences as a factor in the award and performance of contracts is a violation of the due process and equal protection components of the fifth and fourteenth amendment of the United States Constitution.

31. The plaintiff, Western States Paving Co. Inc., asks the court to declare such regulations, policies, and practices unconstitutional.

V SECOND CLAIM

22. The concerted actions of the defendants deprive Western States Paving Co. Inc. of civil rights, privileges, and immunities secured by the Constitution and laws of the United States including 42 USC § 1981; 42 USC § 1983; 42 USC § 2000(d).

VI THIRD CLAIM

23. The actions of the defendants are in violation of the Constitution and laws of the State of Washington including RCW 49.60 and Proposition 200.

VII FOURTH CLAIM

24. As the results of the defendant's policies and practices, Western States Paving Co. Inc. was not awarded the subcontracts, despite being the lowest bidder. As a result, Western States has suffered damages and lost profits.

VIII FIFTH CLAIM

25. The acts and conduct of the defendants will continue unless restrained by the court.

IX PRAYER FOR RELIEF

Wherefore, the plaintiff, Western States Paving Co. Inc., requests this court to grant the following:

1. Entry of judgment declaring the requirement of the defendants that a specified percentage of the total contract amount be awarded on the basis of race and sex based preferences (DBE's) is unconstitutional.

2. Entry of preliminary and permanent injunctive relief;

3. An award of monetary damages as may be proven at trial;

4. An award of attorney's fees and costs;

5. Such other and further relief as the court deems just and proper.

DATED this 13 day of November, 2000.

/s/ Gary E. Lofland
Gary E. Lofland WSBA #12150
LOFLAND AND ASSOCIATES
Attorney for Plaintiffs

Verification

I am the Plaintiff herein and have read the foregoing Complaint, know the contents thereof, and believe the same to be true and correct.

/s/ Brian Simms
Brian Simms
President, Western States
Paving Co. Inc.

SUBSCRIBED AND SWORN TO before me this 13 day of November, 2000.

/s/ Ginger M. Hansen
NOTARY PUBLIC in and
for the State of Washington
Residing at Yakima
My Commission Expires:
7/6/03

[STAMP]